Q. Post-indictment?

A. I'm sorry, post-indictment that were interviews with witnesses that we hadn't spoken with pre-indictment, which, you know, are in a different category than maybe your core pretrial interview in a typical case where it's a trial prep session and there is nothing new in many cases or exculpatory that comes to light. And so it wouldn't be something that was -- that you would ordinarily produce, but -- and I don't -- I -- I guess to answer the question, I don't think that -- I certainly, at the time, didn't have the view that there was a legal difference. It was just a practical difference in how we were treating them.

Q. Maybe we should do this before we go to the blow by blow. You've learned today that AUSA #2 and AUSA #1 said that they thought all of the MOIs were being disclosed Zuckerman had said they thought all of the MOIs were being disclosed. And they based that on a number of things. But let me ask you -- I want to talk about what Zuckerman knew or should have known or didn't know.

So let's start out with a general question: Do you believe that Zuckerman knew they were only getting some MOIs?

A. At the time I did, yes.
Q. Why?
A. I mean, I suppose they could -- I guess they knew. I assumed that they knew because they were, one, just general practice; two, because they were also talking with witnesses and counsel for witnesses that we were conducting trial prep interviews. They knew that we had -- they knew that we had spoken with Witness #13. We knew that they had had an extensive interview with Witness #13, just to give an example, and even got a -- you know, we got a summary of that interview over the telephone from Witness #13 lawyer who told us what Zuckerman had asked and what Witness #13 had said.

The -- and they knew that what we had -- and certainly by the September 21st letter or whatever the date was, they knew that what we had disclosed from the Witness #13 interviews was fairly brief, and was the information that we believed from our conversations with Witness #13 was required to be disclosed.

So I believe that Zuckerman was aware that we were not -- that's an example. Also, we knew that they were having extensive discussions with Witness #4, or at least with Witness #4 counsel and knew what we had been discussing, what we had discussed with

Witness #4 in our meetings with him. So, I mean, I can't -- two things, number one, I believed at the time that Zuckerman understood that we weren't disclosing post-trial interview memos, and as I sit here now, I still believe that Zuckerman knew at the time that we weren't disclosing post-trial interview memos.

Q. Let's look at a few specific documents and pleadings. There is a tab, OPR court. If you go to -- I got them out of order, but if you go to 006 and 7, 006 through 9, this is the first pleading that talks about MOIs. So this is filed in February of 2015, it's after the decision, I take it, to only disclose pre-indictment MOIs.

And on the second page 0007, in the middle of the first full paragraph, "Defendant concedes the United States has provided extensive discovery, which included in that discovery materials, which the United States is not required to disclose, including FBI 302s."

And you are going to see that there are similar statements and two more pleadings down the road. To me, and I'm not asking you who made the final call, I read this as meaning all 302s because if there had only been some, it would have said some.

Do you remember what the intent was in either

writing this or approving the language?

A. I -- well, first of all, I can tell that you we certainly didn't file anything with the intent of misleading the court or say anything in a pleading with the intent of misleading the court.

Q. Okay.

A. I don't know, and we can look at what the other statements were later in the later pleadings. You know, at this point, the intent of the statement and the intent of the brief or response was to make the point that our discovery had been broader than what's required, and that we had -- you know, I certainly don't think that was intended.

And at the time this particular statement was made, I don't know whether it was true are on not. I mean, obviously, there was what I call the inadvertently undisclosed.

Q. No, there were post-indictment interviews?

A. That were not disclosed.

Q. Yes.

A. But the intent of the statement was not to indicate -- and I see how you could read it that way, but the intent of the statement wasn't to indicate that we had produced all 302s, the intent of the statement

was to make a point that we had gone above and beyond our obligations of producing discovery. It said that we had had produced 600,000 documents, we had produced FBI 302s when we could have instead relied on letter disclosures or just exculpatory material, that we had them given more than we had to give them.

Q. Okay.

Flip to OPR 10, which is the next pleading that talks about 302s. So this is filed May 14th of 2015 at the top of OPR Court 11. It says here, "The United States exceeded its discovery obligation by producing a digitally searchable format, type 302 reports that summarize witness interviews, regardless of whether they contained exculpatory information."

And then down below because this is a request for the agent notes, it says, "Obligation does not require unrestricted access to handwritten notes taken by agents in witness interviews, especially when the type-written equivalent has been produced."

Let's just do the last one, too, and then we'll ask them all together. So the next final pleading was filed in July of 2015. It's 00019 and on 00020, there is a representation to the Court that what's been produced include -- and this is at the bottom --

"Designations include memorandums of witness interviews conducted by federal agents, despite defendant's suggestion that the United States has not disclosed those interviews."

And then on 0026, it says, "In fact, the United States has produced memorandums that reflect the substance of well over 300 witness interviews, and in compliance with the Brady order, the United States designated a number of those as containing possible Brady material."

A. So I lost you a little bit, Mark. What was the second to last one?

Q. The second to last one was at 0020.

A. Can I mark on this?

Q. Of course. It starts with "notably" down at the bottom. And then on page 0026, up at the top, and then on the bottom of page 0020. So the question is: If you take all of these together, and I can tell you how I read them, as a representation of the Court that the United States is producing all MOIs and, therefore, you don't need the agent notes because you have the MOIs.

And I know you've said, and I assume it's true for everything, that there was no intention to mislead

the Court and the defense about that, but these are well after the decision -- especially the last one, well after the decision was made not to disclose some of the MOIs.

And I guess the question is: Why didn't you say that?

A. Well, the -- again, I've tried to reconstruct this in my mind. In the dispute over notes, I -- certainly my understanding of what the defense was asking for at the time was notes of -- notes of interviews that they could use to compare to memoranda. In other words, we've given you these memoranda, now they are coming back and asking for the notes, so they can use the notes to compare them to the memoranda and say there are inconsistencies here, he said happy and the memo reflected glad.

Q. Or from their perspective, a deliberate omission of exculpatory material?

A. Sure, or from their perspective --

Q. What they would want to know from their perspective.

A. Sure, understood. And our point was that we've given them these memos, and unless there is something -- unless they have some specific reason to

believe that the notes are different from the memo that they've already been provided, and the law generally doesn't require us to turn over the notes to them.

Q. That's true.

A. That was the point that we were trying to make. And there was -- the first thing I can say is that all of these statements were intended to refer to the pre-indictment interview memoranda that we had produced. And as to your question of why we didn't say that there were post-indictment interview memoranda that we hadn't produced, you know, again, all I can say to that is that we -- and I say we -- I don't know -- I'm not sure what AUSA #1 would say about this, but --

Q. We asked AUSA #1 We asked AUSA #1 and AUSA #2 what they intended when they either drafted this, because you didn't draft some of these. They drafted them and you reviewed them, or you drafted and they reviewed them. We asked them what they understood this to mean and what they understood this to mean was consistent with what he had told you that we meant all MOIs.

A. What I was going to say --

Q. Sorry.

A. -- is that we had discussions about the -- not about the MOIs specifically, but about the interviews

that were conducted post-indictment. And the consensus was that there was no significant exculpatory information that hadn't, in the post-indictment interviews, that -- generally, the consensus was that there was no -- and again, I'll just tell you what the U.S. Attorney said, and I didn't hear anybody disagree with him, that there was really no exculpatory information in anything anybody has told us since the indictment, so.

Q. Did anybody say in response to that, that's true but our disclosure obligations are broader within Brady pursuant to department policy? So maybe we don't think it's exculpatory, but our disclosure obligations go beyond that pursuant to department policy.

A. I'm trying to recall. I think in those discussions the -- my understanding of what he meant was that he was using the word exculpatory synonymously with discoverable as a sort of shorthand for information that was required to be disclosed.

Q. Okay.

A. I -- and again, I hate to put too much on AUSA #2 because AUSA #2 was very junior, even more junior than I was and was not --

Q. AUSA #2 is kind of as junior as you can get.

A. Yes, but, you know, it -- and maybe [redacted] didn't say this, but if AUSA #1 thought that there was -- [redacted] was in most of the post-trial or many of the post-trial interviews. We certainly discussed most of the post-trial interviews with any significance.

If [redacted] thought there was exculpatory information from those interviews that needed to be disclosed, [redacted] was aware of the Court's order to identify exculpatory information and point the other side to where it was. And I don't recall ever having a conversation with AUSA #1 where [redacted] said -- I can confirm that there was never a conversation with AUSA #1 where [redacted] said, we need -- this is exculpatory, we need to identify this, and I said no.

We certainly would have identified anything that [redacted] said that [redacted] thought needed to be disclosed, and the same thing with the U.S. Attorney. His view was it would have been disclosed in the letters was more than sufficient.

MR. SCIORTINO: Well AUSA #1 was under the impression that the entire memorandum was --

THE WITNESS: Right. I understand that. The point I'm making --

MR. SCIORTINO: You are saying the court

order --

THE WITNESS: It's a little bit different. The court order required us -- I guess, you know, it surprises me --

MR. SCIORTINO: Was that on a reoccurring basis that the court order required you to do that on an ongoing basis?

THE WITNESS: Yes. I don't have it in front of me, but that was my understanding of it was that if we -- I don't know if it said or not but we continued to disclose stuff a week before trial or ten days before trial.

MR. SCIORTINO: With respect to this pleadings, which, I guess, were drafted at least in the first instance by someone like AUSA #2 .

THE WITNESS: I don't know who drafted these.

MR. SCIORTINO: Is it possible that when you were looking --

MR. MASLING: I know, if you want to know. So the February one was draft by AUSA #1 the May one was drafted by AUSA #2 and the July one was drafted by Mr. Ruby, but everybody saw them.

MR. SCIORTINO: So is it possible that at

least on the ones not drafted by you, you were more focused on reviewing this issues about the notes and making sure that that point was made, that whatever's in the notes, if it's also in the memoranda, you don't get the notes, or you might not have been really focused on this issue about whether the way it was described and the way memoranda were generally described that inadvertently suggested that they all were produced.

THE WITNESS: That's -- I mean, yes.

MR. SCIORTINO: In the rush of trial --

THE WITNESS: The point that I was trying to make was exactly that, that the law doesn't require us to turn over notes for memos that have already been disclosed.

MR. SCIORTINO: So when you were reviewing those, that's the issue you were focused on, not this other stuff?

THE WITNESS: That's right. And that's what I believed. And I could go back. It's possible that I misunderstood their motion, but that's what I believed they were after was notes for -- the notes that corresponded to memoranda that we had already produced.

BY MR. MASLING:

Q. There was a big blunder of those motions, but

I think what you were responding to in these sections of the briefs was their request for the notes?

A. Yes. And in particular, my understanding was that they were asking for notes that corresponded to MOIs that had been produced.

Q. That they knew existed, basically?

A. Yes.

And as to the post -- you know, I, again, would -- I know these kinds of statements may not be worth much to you guys, but I can tell you that if I would have read it and thought it was misleading to the Court, I would have changed it or taken it out.

That was -- the question of whether there was -- the question of whether they were post-indictment MOIs or the fact that they were post-indictment MOIs that hadn't been produced, which is not what I was focused on when I was thinking about these motions or these responses or drafting the one from July that I apparently wrote.

Q. Did the U.S. Attorney review pleadings before they were filed?

A. Depends. Sometimes he did, sometimes he didn't. And I would say more frequently the -- more frequently, I would discuss with him the significant

portions of them, and this is what they are saying, here is our response.

Q. I know he saw the July one.

MR. SCIORTINO: Can I direct your attention back to 148, General 148. This is the disclosure letter.

THE WITNESS: I'm here.

MR. SCIORTINO: Does this letter tell Zuckerman that you are not getting all of the MOIs implicitly.

THE WITNESS: Yes. This was the one that I was referring to when I said with Witness #13 at least.

MR. SCIORTINO: And also with Witness #8 right?

THE WITNESS: Yes. They would have known that we interviewed, and at the time I thought that Witness #8 -- or assumed that Witness #8 was a post-indictment MOI.

MR. SCIORTINO: So at least with respect to these --

THE WITNESS: [redacted].

BY MR. MASLING:

Q. Yes.

Whenever you want to take a break?

A. Yes.

MR. SCIORTINO: At least with respect to these, Zuckerman had a clue that these were MOIs that they weren't getting.

THE WITNESS: Yes, and with Witness #13 in particular. They knew that we had spoken with Witness #13 presumably. I can't imagine that they looked at this, knowing the extent of our discussions with Witness #13 because they had interviewed Witness #13 as well, knew that we had interviewed Witness #13 knew that we had turned over a lot of documents relating to Witness #13 I can't -- I would be -- I just do not believe that they didn't realize that there were MOIs post-indictment interview MOIs that they weren't getting.

BY MR. MASLING:

Q. I mean, there is another argument to be made that Zuckerman knew or should have known, and that is you, in fact, did produce one post-indictment MOI, right, and that was Witness #2 (ph)?

A. Right, we did.

Q. And if they really paid attention, they would have looked at the Bates stamp number and seen this big gap between the last one they got and the one that they got in August or September of 2015. And, in fact, we'll

look at those and they sent you an e-mail after they got them and said, "Thanks, but whatever everybody else?" So one might infer from that that they would have known.

A. Like I said, do I think they knew? Yes, I think they knew. And, John, this letter that you pointed to is what -- and the Witness #8 point is equally valid, but the point on Witness #13 that I made, and also Witness #7 I think the Witness #7 was post-indictment?

Q. Yes.

A. Here we disclosed that these people have been interviewed by federal agents, they don't have MOIs for them. Again, I believe and continued to believe that they were fully aware that we weren't producing post-indictment MOIs in their entirety.

Q. Let's go to one last issue about representations to the Court. OPR Court 0037. So this is a partial transcript of --

A. Witness #4

Q. -- a conversation between you and the Court and defense counsel during Witness #4 cross-examination. And the jury, at this point, had been excused. And on lines 8 through 10, you say to the Court, we've turned over grand jury material from this witness. We've also turned over 302s from our interview

with this witness.

Do you have a concern that you made an inaccurate statement to the court?

A. I think we had. Had we not turned over 302s?

Q. One of them, and you had four that had not been disclosed or five?

A. And what was their allegation. The allegation that we were addressing here, I think, was that we had known that [redacted] was going to say that [redacted] didn't participate in a conspiracy with the defendant, which we didn't know. I did not -- I didn't think: I knew that [redacted] was -- I suspected that [redacted] was not going to be a terrific witness for us on cross, in part, because I knew that they had been spending an enormous amount of time prepping with [redacted] counsel. You know, at this point, I -- and again, there is no intention there to tell the Court that we produced post-indictment MOIs. We had two, at least, pre-indictment MOIs on [redacted].

Q. Right, but you didn't produce one.

A. Well, at the time I believed that we had.

Q. I see.

A. So certainly, again, there was no intention of misleading the Court here. And at the time I made that statement, I don't know if I -- I certainly believed

that to be accurate, that we had turned over 302s from our pre-indictment interviews with Witness #4 And the point is what was at issue here was whether or not we had known beforehand that the witness was going to testify that Witness # didn't participate in a conspiracy with Blankenship.

And I believed, and I'll have to go back and look at all Witness #4 grand jury testimony, but Witness # acknowledged -- short explanation of what the issue was and what our response was, Witness # had acknowledged or why we responded the way we did, Witness # had acknowledged that there was an understanding in which Witness # and Blankenship were participants that there was going to be routine safety violations at UBB.

So, in our minds, Witness # had acknowledged -- Witness # may not have understood what the legal definition of a conspiracy was, and I think Witness # admitted that on redirect, Witness # had acknowledged the elements of the conspiracy. So I think it came as a surprise to us that Witness testified that there was no conspiracy.

Q. Do you think it's a fair or unfair reading of the statement we have also turned over 302s from my interviews with this witness, to read it as meaning, we've turned over all our 302s from interviews of this

witness?

A. You know, I can tell you that that was not what I meant when I said it. And again, it's -- and I understand that this is what you guys do. It's a painful process to have bits and pieces picked out of the record from a nine-week trial and --

Q. The interview focused on potential problems.

A. I know, I understand.

Q. He we don't go through all of the stuff that was done right because we'd be here a long time and there would be no point to that if we've already concluded that you've done something right.

A. I understand. I would -- and again, you know, this is the kind of thing that when a defendant tells me this, it makes me roll my eyes, but I have -- it's just not -- the thought of trying to say something that would mislead Judge Bergenner would just never cross my mind.

MR. SCIORTINO: You mean to say we've turned over all relevant 302s?

THE WITNESS: We've turned over everything that could be exculpatory. And we all may differ, but at the time, certainly I believed that to be true. We had turned over [redacted] 302. We turned over 302s pre-indictment, and we had disclosed everything that

Witness #4 had told us that we believed to be exculpatory.

And to the point that they were making, there was nothing that Witness #4 had told us that led me to believe Witness # would testify that Witness # didn't participate in a conspiracy. I assumed -- I mean, Witness # had told us what Witness # told us, and my belief was that Witness #4 lawyers explained to Witness #4 had explained to Witness #4 what a conspiracy was.

MR. SCIORTINO: Was Witness #4 testimony on cross that Witness # hadn't participated in any conspiracy? I read that part of the transcript, and the defense attorney walks Witness #4 through this line of questioning fairly confident that you can tell Witness # knows what the answers were going to be.

How surprised were you when you heard all of that stuff?

THE WITNESS: Surprised. Like I said, I thought that Witness #4 -- I felt like, and if you read the redirect, you can probably tell I felt like Witness #4 had deviated from what Witness # told us in the grand jury and what Witness had told us before the grand jury. I felt like Witness # had backed up on us. I didn't think -- I knew that -- I expected that Witness # was somewhat sympathetic to Blankenship, just because they had worked together

for so long and Blankenship had given Witness #4 start.

But I didn't think Witness #4 lawyers would let Witness #4 do that. I didn't think Witness #4 lawyers would let Witness #4 deviate. It was pretty risky. I mean there was -- I don't know that we had a -- there is probably not a perjury case there, but I've had lawyers ask me after Witness #4 testimony, are you going to go after Witness #4 are you going to take a look at Witness #4 for perjury. It was a really risky strategy on Witness #4 part, so, yes, I was surprised.

BY MR. MASLING:

Q. The one statement that FBI SA #1 pointed us to in a post-indictment MOI, which seemed to be arguably consistent with Witness #4 testimony on cross that Witness # didn't conspire with Blankenship is from an MOI in April of 2015. I'll just read it to you, but I can show it to you. The last sentence says, "Witness #4 advised that Witness # never knowingly gave a direct order or Witness told someone to do something that caused a law to be broken."

Would that have been an exculpatory statement or inconsistent with other statements that Witness # had made that should have been disclosed to the defense?

A. That Witness # said that Witness # had never given a direct order?

Q. OPR MOI 110, if you want to look at it. This is from April 2nd, 2015, post-indictment. We asked FBI SA #1 was it a surprise to you what Witness #4 had said on cross. Well, there was this one statement that Witness # had made.

A. Well, I mean, maybe our view of it was overly legalistic, but that was -- and again, you can get -- there is no question that you can get blinkered by your own view of the case. But our theory was not that Blankenship or Witness #4 had ever ordered anybody directly to commit -- to violate a mine safety law, rather it was that there was a tacit understanding that mine safety law, that employees, that everybody had a tacit understanding or expectation -- which is what Witness #4 admitted to -- that everybody at the mine was going to violate safety laws when it was necessary in order to maximize profit. And that statement is not something that struck me then or strikes me now as inconsistent with that.

Q. Okay. Do you want to take a second?

Do you want to take a break?

A. [redacted]

Q. That's very important.

A. If you all don't mind, I might need a minute

to see.

* * *

(Brief break)

* * *

BY MR. MASLING:

Q. Take a look at OPR General 59.

A. General, okay.

Q. So the bottom is an e-mail from Steve Herman from the Zuckerman firm to you, and he asked you a question. He said, "We understand that all memoranda of interviews that the government has conducted as part of its investigation, as well as the documents used during those interviews have been provided to the defense." That's on April 15, 2015. A few days later up on top, he says, "Can you respond to the e-mail."

We see no evidence that you actually responded to this, so the first question is: Did you respond?

A. I don't recall responding to it.

Q. I didn't see it, but, you know, if you delete and then delete again or do it really fast, it doesn't show up?

A. How do you know that?

Q. I'm very careful about these things. No, you have to know that in this job because the absence of

something doesn't me it didn't happen.

A. I did not know that.

MR. SCIORTINO: I didn't know that.

BY MR. MASLING:

Q. That used to be true. It was true then it is not true now. So now it's immediately captured by the server and you cannot go delete and then delete it from the delete box and go whoo that was a close one.

A. Interesting. No, I don't have any recollection of responding to him.

Q. Do you think you should have responded with a correction to his understanding because it's wrong?

A. Well, again, I will provide some background here, based on the direction I got from the U.S. Attorney, which his view on correspondence from the defense was that -- and this is close to a quote, if they want a response from us, they can file something and we'll respond.

His view was that generally, we should not respond to correspondence from them, and, in general, minimize our discussions with them outside of briefing that was filed before the Court. That was a directive. Should we have responded to this --

Q. And by this, let's be clear, it's giving you

their understanding of a discovery issue and their understanding is wrong.

A. Again, I can't say that I have a specific recollection of this.

Q. Okay.

A. I didn't make a conscious decision, didn't make a decision -- an intentional decision to leave them with a misunderstanding of the record. You know, I can't say because of the instruction that I had from the U.S. Attorney, you know, I can't say that I -- in fact, I would say that I did not carefully review all of the correspondence that we got from the defense.

MR. SCIORTINO: Was this directive ever communicated to the defense.

THE WITNESS: That we are not going to talk to you?

MR. SCIORTINO: No, that if you have something substantive to complain about discovery, or if you have a discovery request, put it in the e-mail, just file something and we'll respond to it.

THE WITNESS: No, I don't believe so.

MR. SCIORTINO: I remember when I was an AUSA, there were certain defense attorneys who would lay little traps in conversations and e-mails and stuff and

say, as we previously discussed, this, this and this, which wasn't right, you know. And then they would take your failure to disagree with them as some sort of substantive admission.

THE WITNESS: Yes.

We may have said that at some point. Part of his concern, I think, and what he expressed to me was that, again, I'm paraphrasing, that everything they sent us was an attempt to trip us up somehow, to create a mistake, inject a mistake, create a mistake in the proceedings that they could use later.

MR. MASLING: They are very tactical people.

MR. SCIORTINO: Was there anything ever expressly said to them, my failure to address anything in your e-mails wasn't that I agree with it?

THE WITNESS: I certainly -- I can tell you I thought about writing that. I don't know if I sent an e-mail or a letter that said or not.

MR. SCIORTINO: But there was some of that dynamic going on with this --

THE WITNESS: That's certainly true. I mean, our belief was that their correspondence was that it was -- it was intended to trip us up, was intended to

further bury us in paper and generally was meant to be tactical rather than constructive, and that those were reasons that the U.S. Attorney explained in telling me that we should, in general, not respond to their correspondence as distinct from their pleadings.

And after -- at some point in the summer -- now, this pre-dated that, but at some point in the summer of 2015, I was formally or officially banned from talking to them at all. And part of the reason that he -- I don't know if this is in the e-mail or not -- part of the reason --

BY MR. MASLING:

Q. I know what the reason, but the ban --

A. Yes, part of the reason that he said he got so upset about our communications with the defense was that he had previously told me not to talk to those guys at all. Now, I have not interrupted to be that sweeping, but he certainly said that we should generally not respond to their correspondence. I didn't interrupt it to be a complete ban on communicating with them, but that was how he -- that's what he said he had told me when we had our disagreement in summer of 2015.

Q. All right.

Let's talk a little bit about Witness #2

(ph). So Witness #2 MOI is at OPR MOI 27, that's where it starts. So you or someone -- my question is: Who made the decision to disclose this MOI in its entirety? And it was the only post-indictment MOI that was disclosed.

So I guess my first question is: Who made the decision to disclose it?

A. I was -- let me look at this. I mean, I remember participating in the interview. I can't say I recall specifically, since I was in there and the only other AUSA it looks like in the interview was AUSA #2 but I probably made the decision to disclose it.

Q. So -- and we ask because, you know, we've looked at these ad nauseam now, and this just doesn't seem different in any way from the other MOIs.

And so do you have a recollection of why you chose this one as, we are not going to do a letter of disclosure, which you did pretty shortly thereafter for the other three, this one needs to go in its entirety?

A. Witness #2 -- so two-part answer to that. Number one -- and again, this -- there wasn't a formal process in place for reviewing MOIs to post-indictment MOIs to see if, should they be produced, should they not be produced. We really relied on our recollections of the interviews.

And in retrospect and with infinite time and resources, would we have done that differently? Probably. This interview -- and I don't know if it comes across from the MOI or not, it may not. This interview struck me as -- in the witness Witness #2 I remember this -- struck me as somebody who was without question going to give exculpatory testimony, if [redacted] were called.

And in that way -- and again, I don't know if that is -- if that comes across in the MOI, or if that was more my impression from the demeanor of the witness and the way [redacted] said what [redacted] said. And, of course, the MOI is a summary. I don't know if the -- at this point, it's beyond my recollection whether the agent wrote it up in the same way that Witness #2 said it.

But my recollection of what I thought at the time was that Witness #2 -- that there was a lot of exculpatory material in there in [redacted] interview. Again, I don't remember what the MOI said, but that there was a lot of exculpatory material or what the defense would regard as exculpatory material, at least discoverable material in his interview, and that we should probably just go ahead and turn over that MOI.

MR. SCIORTINO: It would be too difficult

to summarize in a letter?

THE WITNESS: Yes, that's a good way of putting it. I thought there was more in there or enough in there in [redacted] interview that it made sense just to turn over the whole thing. And again, acknowledging that the process we used was probably an imperfect process.

If somebody else had said, there is so much exculpatory information in one of these, in this interview or that interview or that MOI or that MOI that we really need to indicate, that we really need to point to the whole thing as exculpatory under our duty to identify exculpatory evidence pursuant to the court order, I probably would have said, okay, let's turn over that whole MOI, too.

Q. Even with the order you still have to turn that --

A. Sure, that's right. And if somebody had said -- now, apparently, the other members of the team take the position that they thought that we were disclosing all of the MOIs, but there wasn't any other -- there wasn't any MOI or any interview taken that -- to my recollection, that any of them were in for which they said, exculpatory, got to designate.

MR. SCIORTINO: Right. So this imperfect process that you described where you would not go through the post-indictment MOIs to look for exculpatory evidence, but relied on your recollection of having been in, was that how you drafted this letter, or did you -- this one, this letter that says OPR General 148.

MR. MASLING: The September 21st letter.

MR. SCIORTINO: Yes, did you rely on your recollection for that, or did you actually go back and look at the MOIs to draft the letter?

THE WITNESS: I would say I relied on -- identifying witnesses, that was from recollection. In developing the phrasing, the actual language that was in the letter -- that's a good question. For Witness #13 I think for Witness #13 certainly that was -- we had discussed Witness #13 a lot internally, all of us, and that would have been from recollection. Witness #7 would have been from recollection. I don't remember if I went back and looked at the MOI from Witness #8 or not. Probably. It was old enough that I probably would have.

MR. SCIORTINO: That's kind of a risky approach though isn't it, if you are trying to remember an entire --

THE WITNESS: Well, like I said, it's

certainly not ideal, but in retrospect with more time and more resources and the benefit of hindsight, I would certainly say that a different approach would have been better.

BY MR. MASLING:

Q. OPR MOI 73, which is Witness #3 MOI. So in your written response to us, you had told us that you personally had made the decision that Witness #3 MOI did not have to be disclosed because you thought it was inculpatory and not exculpatory.

Do you remember that?

A. I do. Now, I can add to that.

Q. Sure.

A. Again, Witness #3 was another person who we discussed internally, and I was not alone in that view.

Q. I want to show you some things that are in Witness #3 MOI, which look to us to be arguably helpful to the defense and ask you whether you should have disclosed this, even though you decided not to. So if you look at the top of page 3 of Witness #3 MOI, so it's 0075, first full paragraph talking about worksheets, about coal production and --

A. Is this the one that begins, "The summary of final production"?

Q. Yes.

The sentence says, "Blankenship would tell them to go back and make sure that the figures used were not too aggressive." So the way I read that, and it may not be the way you recall or what it said is that the government's theory of the case was it was produce, produce, produce, we don't care about safety, and here Witness #3 is saying Blankenship was saying, I don't want the production estimates in the future to be too aggressive.

A. I mean, yes, I see what you are saying. First of all, I don't remember making a specific determination or having any specific discussion with others -- who else was in this -- with the U.S. Attorney about that line. Reading it now -- again, reading it now, I don't know that I view it as inconsistent with our view of the case.

Our view was that -- and the evidence was that in Blankenship's push for production -- there was significant evidence that Blankenship's push for production came in the form of telling mines to beat plan. So whatever the numbers were in the plan, what he pushed for was to beat plan at every instance. I can --

Q. And here you have a statement that's arguably inconsistent with that.

A. Well, this is talking about how the plan was developed. I understand what you are saying.

Q. So we asked both agents who were on this case since April of 2010 and AUSA #1 and AUSA #2, who were on the case later -- all four of them, as well as you, know the case way better than we do, and we put before them a series of statements like this one, who were derived from one MOI or more than one MOI that weren't disclosed, and I'll tell you all four them, when we told them about this said that would have been helpful for the defense.

A. Well, I --

Q. So you can disagree.

A. As I said, it's -- I don't believe -- do I think it's material, no. Could you look at it and --

Q. Materiality isn't the description of disclosure obligations?

A. I understand. Could you look at it and conclude that it should have been -- that it was discoverable, yes. Given the context of the case, is it necessarily discoverable, is it exculpatory, I would say no. Is it necessary discoverable, I would say, maybe, but, again, at the time, at least, that was not -- our interpretation of or our understanding of how

Blankenship pushed for production was separate from what went into these worksheets.

Q. Flip over to 76, the next page, the first full paragraph. And the MOI states in part Witness #3 stated that "Blankenship became less involved in the budget review over a two-to-three-year span." And then further on in that paragraph, "Blankenship was not involved in the final business plan reviews." That seems directly contrary to one of the government's main points that Blankenship was making all of the decisions?

A. See, I disagree with that.

Q. Okay.

A. The reason is, again, it was never -- what I understand -- what we understood to happen was that Blankenship made the final decision without regard to whether he was in a meeting or not.

Q. We agree with that completely, so one could read this as it had nothing to do with meetings, it's just that he was not involved in final business plan reviews. It doesn't say anything about meetings.

A. That's not my understanding of that. My understanding was that the final business plan review was a meeting.

Q. Okay.

The agent who drafted this pretty much agrees with you on that one. Go to 77, the pinaltin (ph) paragraph. "Witness #10 told Witness #3 Witness # wanted to focus on the more serious types of violations. Witness #10 was specifically interested and focused on eliminating series violations. Blankenship told Witness #3 reprogram the system to determine which people were responsible for violations and who was responsible for not eliminating violations. Blankenship wanted to know who were the repeat offenders."

Do you think that should have been disclosed or would have been helpful to the defense?

A. Was that discoverable?

Q. Another way of asking the same question, but, yes.

A. Yes.

I mean look, in retrospect, seeing what -- you know, seeing the evidence that they put on at trial, that is one that the fairest way of saying it is that's probably one we missed. Now, I believe that, I mean, certainly, I don't know if this specific information, I haven't looked for it, but certainly similar information to this was in documents that we disclosed that were plenty of e-mails about Blankenship making statements

that could be read as telling people to -- I mean, everything regarded the hazard elimination program could be regarded as Blankenship making statements, telling people to track and reduce violations.

MR. SCIORTINO: And that came into evidence, right?

THE WITNESS: It did, over and over and over.

MR. SCIORTINO: Something about the spider, too. Let's not forget the spider.

THE WITNESS: Kill the spider.

MR. MASLING: Kill the spider. Let's get it right.

THE WITNESS: Look, I mean, do I think that -- do I think that this -- and I don't know if there are specific e-mails in which Blankenship gave Witness #3 this instruction or not, I just don't remember, but certainly there was a mountain of similar evidence that was produced, and it came in at trial. All I can say about this one is, again, it seems like one we missed.

BY MR. MASLING:

Q. When you told OPR that the Witness #3 MOI contained only inculpatory information, do you remember whether you reviewed the MOI?

A. I did review it. And like I said, it is -- again, all I can say about this one is I would describe it as one that we missed, one that I missed. I don't think this statement is -- again, in the context of the case and in the context of the evidence that was produced, I don't think it's strongly exculpatory, but I wouldn't -- sitting here now, I would not describe that as inculpatory.

Q. All right.

Let's go blow by blow for some of these things.

MR. MASLING: What time do you have to leave?

* * *

(Brief break)

* * *

BY MR. MASLING:

Q. Kind of not chronological, just kind of go e-mail by e-mail, OPR General 32. And it's a fair response, as you've been doing, but to say, I don't remember, this is a long time ago. We are not looking at details, so. So Paralegal #1 to you, this is post-indictment, and Paralegal #1 sends you a Witness #4 MOI, and Paralegal #1 only has one, and Paralegal #1 says, if you believe

there should be more than one, I would be glad to e-mail [redacted] and check and, in fact, there had been two interviews with [redacted] --

A. Yes there were.

Q. -- before that. I take it you probably just didn't remember that there had been two? Do you have any recollection of the e-mail or the response?

A. No, I don't.

Q. Because the e-mail suggests that [redacted] thinks there is more than one?

A. I read that -- and again, just sort of knowing my dealing with [redacted] I might have asked for the [redacted] 302s generally, and maybe that was [redacted] response. I'm speculating.

Q. Okay.

A. I don't remember this or responding to it.

Q. OPR 34. So this is -- well, I'm not sure I have any questions for this one. Nope, forget that one. Good to the next page, 34?

A. So Friday January 23, 2015, and [redacted] sends you a 302 for [redacted] pre-indictment, which [redacted] identifies as September 18, 2014, and [redacted] said, "Let me know if you would like to add it to the discovery production." And, of course, you don't because that's

one of the ones that wasn't disclosed.

I just wanted to ask if you have any recollection of why you wouldn't have said yes because it's pre-indictment?

A. No. One of the other things that I guess I have more sympathy for now is witnesses who say they don't read carefully or remember all of their e-mails. I don't. I just don't remember this at all.

Q. Okay.

A. I don't know why I wouldn't. If I had noticed it or looked at the date or looked at what it was about, I would have realized that this is something that should be included. I just don't remember it.

Q. If you have a problem with that, you should come work at OPR because no one ever e-mails us ever. Most of my e-mails come from Living Social and Groupon. I'm sure that's really interesting to you. So this is a spreadsheet that Paralegal #1 gave us yesterday or two days before, two days ago. And it reflects that you told Paralegal #1 not to make some disclosures of MOIs on January 19th of 2015.

And so I've highlighted them on that page, and there is one on another page. And some are post-MOIs, which would be consistent with what you've told us, but

the Witness #14 on top is pre-indictment.

And, again, the question is: Do you remember why you told Paralegal #1 not to disclose that one?

A. Yes. Like I said, at this point, my belief was that everything pre-MOI or pre-indictment had already gone out, and I probably -- if I told Paralegal #1 to do that, it was just because I wasn't looking, did not look at the date. I wasn't looking closely at the date of when the interview actually was. That one was -- yes, that one was pre-indictment, as you said. And I, at this point, as best I recalled, thought that we had already pushed out everything that was pre-indictment.

Q. So do you think it would be fair to say that after December 4th of 2014, when you had the big initial disclosure, every MRI that crossed your desk, you thought we weren't going to disclose pursuant to this discussion you had with the U.S. Attorney that, if necessary, we are going to make a letter of disclosure about disclosable information in it?

A. Yes, that's accurate.

Q. OPR 44. I think we are going to get the same answer to a bunch of these e-mails at this point. So this is a different Witness #14 MOI, and it's from Paralegal #1 to you saying, we just found another one from 2012. Paralegal #1

doesn't ask if you want to produce it, but [redacted] just tells you, I went ahead and I Bates labeled it and stamped it. So I wanted to ask you if you had any recollection of this and why you didn't say, go ahead and disclose that one.

A. I don't. I mean, I'll say, just generally, [redacted] as you've observed, is very good. [redacted] you know, terrific at [redacted] job. [redacted] very good about communicating, which means you get a lot of e-mails from [redacted] and whatever [redacted] decided to do with the document is almost always right. So did I -- I did not -- in a lot of cases, if it seemed like it was something routine that was coming in, and [redacted] was telling me what [redacted] done with it, I didn't always read the e-mails, and I would say very rarely, if it seemed like something that was routine, focus on it or give it much thought.

Q. OPR 46. So here [redacted] sends you a bunch of MOIs, some pre and some post-indictment. This is the first time you've seen the [redacted] as far as we know, the [redacted] MOI, the first [redacted] MOI, the [redacted] MOI that hadn't been disclosed and [redacted] So again, I'm shorthand about this by me asking you a leading question.

Do you think it's fair to say that what

happened was you looked at these and thought they were all post-indictment MOIs?

A. I do. And I don't know if I was -- you know, this was around the time [redacted]. I haven't looked at my calendar and compared this, but this right around that time, and I was not -- and I believe, and I have to look they timing, we were, at this point -- this was right around the time when we got the first big wave of motions. And at that point, everything stopped, except our responses to the motions.

Q. Yes, there were a lot.

A. Yes, there were 75, 100 altogether motions, pretrial motions in limine and other things.

Q. I'm going to skip over some now because I think we know what the answer is, so let's see. Go to OPR 3623. So I think in your initial presentation to us, you had thought that you had had this conversation with the United States Attorney about what to do with post-indictment MOIs, like in the first few months of 2015, and I said to you I think it was a little later. So here is why I thought it was a little later. If you look -- and there is four different -- I characterize this as like a to-do list that you send yourself --

A. Yes.
Q. -- that you are thinking about, and it's better to write it down, otherwise you forget. So at the top of 0063, you have a question to yourself, what do we do with 302s and MOIs that are being generated and prepped. So this suggests to me that you hadn't resolved the issue; is that right, or were you making the distinction between prep interviews and pre and post-indictment interviews? Was that kind of a different line to draw?
What do you remember?
A. Let me see what else is in here, so I can remember what the context was.
Q. And then the next couple of pages are from a day or two later, kind of a revised to-do list, and it has the same question at 0068. And there is a couple more like this, but they say the same thing, all in this general time frame.
A. I am still -- two things, I'm fairly confident that the original discussion with the U.S. Attorney happened earlier than this.
Q. Okay.
A. At various points -- and I don't know what the context for this was or what motions had been filed.

Like I said earlier, there were various points in the case when we had this discussion again, and I don't remember -- you know, I don't remember specifically what prompted me to include this or to put this in a to-do list, but what I do recall, like I said, is that at various points in the case, some of them at least in response to things the defense filed, I would have a conversation with the U.S. Attorney and say, how do we want to handle this. They filed X, do we want to take a different position, what do we want to do. I don't know if that's specifically what this refers to, but that's what this brings to mind.

Q. I forgot this before, but one thing FBI SA #1 FBI SA #1 told was that in what [redacted] was kind of characterizing as true trial prep sessions where you are not asking questions, you are really, we are going to ask you this, what are you going to say -- I mean, they are really like rehearsals, right -- that [redacted] would not prepare 302s for those sessions.

But if that if the witness would say something new, not exculpatory or disclosable, just something new, that's when [redacted] would write a 302. Is that consistent with your understanding? [redacted] couldn't think of an example. We said, well, give us an example of somebody

who was really a trial prep and you didn't prepare a 302, but FBI SA #1 couldn't think of anybody.

A. I can't --

Q. Which fine. We are not saying there is any issue with that.

A. Sure. I can't think of an example of that.

Q. But did you know FBI SA #1 was doing that?

A. No. I mean, FBI SA #1 was preparing -- and, you know, I mean, one of the reasons -- one of the issues here fairly obviously is that we -- I, at least, was not paying sort of line-by-line attention to the MOIs that came in post-indictment. I sort of -- like I said, there wasn't a process where we sat down and reviewed those and figured out what to do with them, or do they need corrections or anything like that.

Post-indictment, there was just so much going on, we didn't do that. I was relying on -- and in discussions that we had as a team, were relying on our recollection of the interviews. I was not -- from my point of view, I guess what I saw is we do the interview and at some point later -- even one-to-one correspondence, MOIs were being dropped off at the office, I was aware of that. I would not say that I knew -- I did not know if it was FBI SA #1

practice to do a different version of an MOI for what we would call a formal or a -- or what we would call narrowly a trial prep session. I was not aware of that.

Q. [redacted] wouldn't do it differently, [redacted] wouldn't do anything at all because there was nothing to write down if there was nothing new.

A. Right.

Q. If you had told us in the past, we are going to ask you this what are you going to say, if we ask you on cross what are you going to say, you know, trial prep.

A. There just wasn't a process where we do the interview and two or three weeks later, I go back and check to see what MOI did I get, or did I get an MOI from the interview.

MR. SCIORTINO: How could you possibly -- I mean, given the crush of this trial, the trial prep all of the things that you have to do, how could you possibly keep 30 separate post-indictment -- was is it 60?

MR. MASLING: 60.

MR. SCIORTINO: 60 separate post-indictment interviews in your memory? Doesn't that run a grave risk that you are going to forget something?

THE WITNESS: Well I --

MR. MASLING: Not all were trial witnesses, but there were a lot that were.

MR. SCIORTINO: That's right. That just seems like a lot to demand of your memory

THE WITNESS: I'm not saying that we didn't go back. I guess my point is the memos come in, Paralegal #1 gets them, generally speaking, puts them in a file. And if a witness was a witness that we were going to call at trial, then when we went to prepare the witness, generally speaking, I would look at the memo from the file, but I didn't have a process of kind of checking off memos as, here is interview X, let's make sure we have a corresponding MOI X. So I don't know that I would have -- I don't know that it would have necessarily registered that a particular interview, that FBI SA #1 thought it was a trial prep session that FBI SA # didn't produce a memo or produce a different form.

Q. FBI SA # didn't say different form, FBI SA # just didn't do it at all.

A. Right.

Q. Because there was nothing to write down. So my understanding when MOIs came in, this is from Paralegal #1 -- or Paralegal #3 and Paralegal #2 maintained what they called

witness files, which was for any MOI, whether they were going to be a trial witness or not, they just called them witnesses in like a folder and any MOI of the grand jury testimony or MSHA were put in that folder. Then I see e-mails from you saying, bring me the witness folder for X, and then you presumably get everything related to that witness?

A. You get everything that they have, right.

Q. So in prepping trial witness, I assume you would have seen, if they had not been disclosed, that MOIs should have been generated in the case?

A. Yes, but if there were a particular section with a witness that didn't result in an MOI, I don't know that I would realize that. They bring a witness file and you flip through what's in it and try to prepare an outline. But certainly at that point, I guess to go back to -- we are still on the issue of, you know, FBI SA #1 [redacted], the difference in how [redacted] prepared -- FBI SA #1 not preparing memos for trial prep sessions, I don't think looking at the witness file would have made me aware of that.

Q. That's most people's practice is not to do the MOIs or 302s or whatever they are for trial prep.

A. Sure.

Q. This is about your fight over the extension request, but I don't think -- I don't think you've answered these questions about why, when you received the MOIs, they reflected post-indictment interviews -- pre-indictment interviews, post-indictment, you assumed that he had been disclosed or believed they were actually post-indictment interviews because they were coming in post-indictment?

A. That's right. And truthfully, like I said, there were occasions when, if an MOI got dropped off and Paralegal #1 sent me an e-mail that said the MOI had gotten dropped off, it wasn't my practice to immediately open it up and read it and see what was in there. It would go in the file, and when I needed the file, I would ask for the file, but I wasn't reviewing those e-mails to see what was there or not or checking off whether MOIs from each view interview had come in.

Q. Okay.

OPR General 125. So, at some point, you had asked Paralegal #1 to go through the MOIs and to pull out negative comments about Witness #4 and Paralegal #1 did, and created a chart.

Do you have a recollection of asking Paralegal #1 to do that?

A. I don't. I can see that I did, but I don't remember doing that.

Q. So I have not attached the whole chart. What I have done is attached here those pages which contain information taken from undisclosed MOIs, some of which were post-indictment, and I think some of those, which were pre-indictment. And the question is -- you know, I guess this is probably relevant to pre-indictment MOIs that were disclosed.

Did you consider whether this information needed to be disclosed to the defense as Giglio? It's not an issue for pre-indictment that wasn't disclosed because they already had them. But for MOIs that weren't disclosure, like the ones we've been talking about, did you consider whether you needed to make a disclosure, a Giglio disclosure, based on the material that Paralegal #1 had pulled together for you?

A. These pre-indictment MOIs were undisclosed?

Q. No, no, no, I misspoke. Well, there were a few pre-indictment MOIs, like the Witness #14 There was a mistake that it was pre-indictment, but it wasn't disclosed.

A. Right.

Q. And that there were some that were actually

post-indictment MOIs that intentionally were not disclosed because you were going to do letters for those one?

A. But not all of the ones pre-indictments were undisclosed.

Q. No, I just didn't copy those pages because the defense had those.

A. Okay.

Again, I don't remember asking Paralegal #1 for this. I don't know why I asked Paralegal #1 for this or what the purpose of this was in the case.

Q. I assume it was to prepare Witness #4 for cross-examination?

A. I don't know. I don't have any recollection of asking her for these.

Q. A few weeks later, you had this sent to AUSA #2 but Paralegal #1 says to AUSA #2, "Steve asked me to send you this spreadsheet," but Paralegal #1 doesn't say what you want Paralegal #1 to do with it. That's at 141, so I don't know if you intended Paralegal #1 to do something with it.

The real question is: Was these Giglio material that should have been disclosed?

A. We, I mean I can tell you that I certainly don't recall thinking through whether or not these were

pre or post-indictment, or whether or not they had been disclosed. I mean, I tell you that there was -- there was an enormous amount of negative comment concerning Witness #4 in pre-indictment interviews with both us -- pre-indictment interviews with us and the interviews that came out the MSHA -- that were done in the MSHA investigation.

So I was aware that there were lots of people who would express critical views of Witness #4 I don't -- you know, if -- and it looks like there were post-indictment interviews that Paralegal #1 at least characterized -- I didn't read the comments, but that Paralegal #1 characterized probably accurately is negative comments about Witness #4 I don't remember doing -- as I sit here right now, I don't remember post-indictment interviews where people were attacking Witness #4 And I don't know if those would have stuck out in my mind at the time.

Again, this may be an example of -- and this may be an example of asking Paralegal #1 to put together something, not, and then having Paralegal #1 forward it on to AUSA #2 without taking a close look at it. But when I thought about the subject of negative comment regarding Witness #4 what I was thinking of was probably what I

thought would be dozens of interviews that were done relatively early in the case where people said negative things about Witness #4 which already would have been disclosed.

And I don't know -- you know, this is just the reality of preparing for trial is you ask people to pull things together because you have an idea about this or that that you might want to do, and then you run out of time to deal with it, and it falls by the wayside and you end up not using their work product.

Q. Who was going to -- never mind.

MR. MASLING: Anything?

BY MR. MASLING:

Q. 144 and 145. So DOL SA #1 send you the Witness #2 in July, and you disclose it about a month later in August.

Do you remember anything about the gap, like why it took a month to decide to disclose the Witness #2 MOI?

A. Did we get it in July?

Q. Yes, 144. Shoot, I read it wrong. Never mind, ignore the question. 146 and 147. 146, so you send the Witness #2 MOI to Zuckerman, and they write back, "Thanks, but how about Witness #3 Witness #1 Witness #7

Do you remember responding to this e-mail? And I haven't found any response to this.

A. No, I don't remember responding to it.

Q. But shortly after, and this is the next page, you send yourself another to-do list and in the middle it says, "Produce Witness #7 question mark; Witness #3 question mark; Witness #8 question mark." Do you remember why you were thinking about the issue of disclosing those MOIs? I kind of assumed it maybe was in response to the question from Zuckerman, but I could be completely wrong.

A. I don't know. And that e-mail was two weeks before then, two weeks and trial prep time. And we didn't -- where he didn't -- I think I worked at least 10 hours every day on weekends from the end of July until the end of trial, and usually 15, 18-hour days on weekdays. That would have been -- it would have certainly felt like a long time. I would be surprised if that's what I was thinking about when I -- I don't know.

The answer is I don't know why I put that in there. It could have been a response, it could have been that I was -- late at night on September 10th -- thinking about things that were rattling around in my

head that we needed to look at. I don't know.

Q. That line suggests to me, I'll ask you if this is right, that in thinking about Witness #7 Witness #3 and Witness #8 that you thought that those might be -- those MOIs might contain discoverable information that you had to think about whether to disclose it or how to disclose it as it turned out with Witness #8 and Witness #7

A. Yes. And at some point later, we did include the statements about Witness #8 and Witness #7

Q. Right.

A. So that -- you know, I taught about it some more and included those. So I guess I agree with your -- yes, it does indicate that that was something that I was thinking about, whether or not we needed to make some sort of disclosure relating to them, and ultimately in the September 21st, I think is the date letter, we did include the statements about Witness #7 and Witness #8

Q. Which are on the next page, 148 and 149. We've talked about this a little, but we have to talk about it a little more. And the real question is Witness #8 because as we read Witness #8 at least as I read Witness #8 it's full of -- it's kind of like Witness #2 I mean, it's got favorable information after favorable information,

and this paragraph is arguably not sufficient. So I want to walk you through what Witness #8 said, and then ask you if you think your summary was fair.

The Witness #8 MOI is OPR MOI 3020059. And I just want to read you -- I'm just going to go through them all, and then ask you if your one-paragraph summary is a fair description of what Witness #8 told you. And I'm just telling you what I personally -- and although we did ask a bunch of these to other people we've interviewed and they pretty much agreed that, yes, this would have been favorable.

Third full paragraph. "Witness #8 suspected that somewhere compensation was tied to safety. Witness #8 stated that Witness # could make a list of safety things that Witness was involved with, and if Don Blankenship was not involved, the list would be half that." Last paragraph, "There was not a period of time that Witness #8 was not trying to follow the law." Next page, first full paragraph, "Committing violations was not intentional."

A. What was the previous one, there was not a period of time when?

Q. "That Witness #8 was not trying to follow the law." The next page, first full paragraph, "Committing violations was not intentional." Third full paragraph,

"Witness #8 stated that it was not a shortage of manpower that contributed to violations, it's the level of experience." Next paragraph, "Massey put pressure on people and held them accountable." Two paragraphs down, "Witness #8 never instructed anyone to break the law the intent was always zero violations."

The last paragraph, there is a description about staffing and [redacted] says, "That was the industry standard that was done at Massey." Top of page 3, "Safety was implied and always there. Witness #8 gave the example of telling someone you love them, if you don't tell them every time you see them, it doesn't mean you didn't love them. Witness #8 stated that was the same with Blankenship, safety was implied."

Next sentence, "Witness #8 explained that if there was something wrong at the mine you were expected to stop, fix the problem and move on." Two down, "It's not economically feasible to have zero citations." Two down, "You are always trying to achieve zero violations. Witness #8 stated that tolerant implies it's okay to receive violations. And if that was true, then everyone in the industry is tolerant of violations."

Next down, "There were discussions about trying to get better. Massey was not tolerant of

anything. It recognized that the head winds were getting stronger, referring to compliance such as agency blitzes." Next paragraph, "Witness #8 stated that upper management wanted Witness #8 to read every citation that was written. Everyone at Massey was trying to do a good job, but could have done better. Witness #8 believed that Witness # was doing everything in Witness #8 power that Witness could."

Next paragraph, "Massey spent more time doing useless exercises trying to get things approved by MSHA. MSHA was putting up hurdles all the time. The whole process was dysfunctional." Next page at the top, "You can go to any mine and find safety violations." Next paragraph, "Witness #8 believed that Witness was reprimanded for running with no air on a section. Witness #8 could not recall the specifics with the reprimand." Witness #8 stated that Witness # feared discipline over certain compliance issues from time to time."

And lastly, the second from the bottom, "Witness #8 believed that Massey was doing a good job reporting accidents." So all of that sounds to our -- we are educated, but not as educated to you all's ears as being potentially helpful to the defense.

And if you look at your paragraph that you wrote, it says "Witness #8 said that Witness believed defendant

was interested in safety, even though defendant did not expressly say that. [redacted] compared [redacted] relationship with the defendant in this regard to a romantic relationship in which one partner knows that the other loves him or her, even if the other person does not often say so. [redacted] also stated that Blankenship was involved in a number of changes related to Massey equipment that [redacted] believed improved safety."

So the question is: Do you think your one-paragraph summary was a fair description of the disclosable information in the [redacted] MOI?

A. Do you know that [redacted] -- [redacted] had nothing to do with UBB. [redacted] didn't work there, wasn't a manager there. [redacted] As far as I know, I don't think [redacted] had ever been to UBB until after the explosion when [redacted] was part of the group from the company that was there to help coordinate investigation activities. So a lot of this is specific to [redacted] experience at a different mine called [redacted]. And I don't know if anybody has pointed that out yet or not.

Q. Actually, not.

A. [redacted] was a, at best, a peripheral witness. [redacted] wasn't anywhere near UBB. [redacted] was -- not only was [redacted]

at a different mine, it was a different group. Massey called its divisions groups effectively. And so a lot of what Witness #8 said that had to do with Witness #8 specific experience, and I couldn't keep up and mark every single statement that you flagged, but a lot of what Witness # said had to do specifically with -- all of what Witness # said had to do specifically -- had to do with Witness #8 experience at Witness #8 operation. Witness wouldn't have any knowledge of what happened at UBB or direction that Blankenship gave at UBB. Now, you can argue that anything anybody says about --

MR. SCIORTINO: Well, it seems like an argument for not including Witness #8 in the disclosure letter at all.

THE WITNESS: Yes.

MR. SCIORTINO: Having decided to include Witness #8 why did you pick out these two little things in a much longer report?

THE WITNESS: You know, again, as I sit here, I don't recall what analysis there was of each of the statements that you cited. I do recall that part of the thinking on Witness #8 and as we go through this, part of the discussion that -- and AUSA #1 says AUSA # doesn't remember ever hearing about Witness #8 and AUSA # may not have,

I don't know, but part of the discussion of what do we do with Witness #8 was Witness #8 wasn't at UBB.

I mean, I take your point, John, but the statements -- the statements that are in the letter -- so the statement that Blankenship was involved in a number of changes related to as Massey equipment that Witness #8 believed improved safety, for example, that's something that is broader than just Witness #8 mind, Witness #8 recollection of Witness #8 relationship or Witness #8 view of Blankenship's -- I lost the page. What was the memo?

MR. MASLING: 59.

MR. SCIORTINO: So you picked out the things that was more broadly applicable, not just in Witness #8 mind, but UBB.

THE WITNESS: I won't say that we got everything that was broadly applicable, but that was certainly part of the thinking in how I thought, at least, what Witness #8 had to say was that most of what Witness # had to say was specific to a mine that was far away from UBB.

MR. SCIORTINO: Was this one of the ones, I can't remember, that you relied on your memory of the interview instead of going back over --

THE WITNESS: I don't remember. I mean

that's -- the statements that are in the letter are what stuck out in my mind from the interview.

MR. SCIORTINO: The [redacted] relationship thing?

THE WITNESS: That stuck out. And [redacted] went through a list of safety changes at Massey that the defense went through a hundred times at trial, if they went through it once, that Blankenship had people wear reflective stripes, and [redacted] made changes to the equipment to do this and that to make it safer. You know, that was a theme of [redacted] in the interview. And I think the statement about how the safety changes that have been made at Massey, how there wouldn't be half of those made if it hadn't been for Blankenship or something like that.

BY MR. MASLING:

Q. First, let's get an answer to the original question, which is, do you think that your summary of disclosable material in the [redacted] MOI is a fair summary of the -- in your September 21st letter is a fair summary of the disclosable material in the MOI?

A. So I guess my answer to that is, number one, I think it affects what's disclosable in here, that [redacted] was, in [redacted] mind wasn't even in the UBB --

Q. Was it a fair summary or not?

A. My answer is that I would have to answer that -- I would have to look take a look the memo in light of the fact that Witness #8 is at a completely different mine from Witness #4 and give some thought to, in light of that, what's disclosable or not. I'm not trying to --

Q. No, no. So let's make it a little more specific. You write in your September 21st letter, "Witness #8 also stated that Blankenship was involved in a number of changes related to Massey equipment that Witness #8 believed improved safety." And what the MOI says is that "Witness #8 stated that [redacted] could make a list of safety things that [redacted] was involved with, and that if Don Blankenship was not involved, the list would be half that."

Let me tell you my -- I can tell you my personal reading of this is that it would be much more helpful to the defense to have what was in the MOI, than what was in your letter. And I guess I'd like you, if you choose to respond to my opinion.

A. I mean, I take your point. I think that what is in the letter certainly puts -- it tells the defense that Witness #8 , if you talk to Witness #8 is somebody who

is going to say that Don Blankenship made significant changes at Massey mines, made significant changes that Witness #8 at least thought improved safety. I'm not arguing with you about the wording.

Would it have been more helpful to quote what the MOI said, probably, yes, but I don't think that the defense was deprived of ultimately the information that -- the information that that would have helped them if they chose to talk to Witness #8 I don't know if they did or not.

Q. Right, but you can't rely on the defense going to interview a witness when you make disclosure decisions. You can't say, well, we know they are going to talk to Witness #8 so we don't have to disclose anything, right?

A. I understand that.

Q. That's right, isn't it?

A. Yes, I believe that's right.

Q. And I have no -- I mean, maybe Witness was their favorite witness and Witness# spent all day with them. I don't know.

I don't think you knew that for a fact or how much time?

A. No, I did not.

Q. Unlike maybe Witness #13 where you had an actual, yes, here's the answer they asked and --

A. We didn't have a similar discussion regarding Witness #13 that's right.

MR. MASLING: Do you want to go into the Ogden memo?

MR. SCIORTINO: I thought you said you didn't want to do that?

MR. MASLING: Go ahead.

MR. SCIORTINO: So before this trial, the United States Department of Justice drafted up discovery obligations for prosecutors in the form of this Ogden memo, which I believe your office was trained on.

Does that ring a bell?

THE WITNESS: Yes.

MR. SCIORTINO: And the Ogden memo imposes upon prosecutors certain affirmative obligations with respect to the search for discoverable information, including affirmative obligation to actually make sure -- you don't have to do it yourself, but you are responsible for making sure that, among other things, witness interviews are gone through for discoverable or exculpatory or impeachable information in a systematic fashion.

Was that done in this case?

THE WITNESS: So I don't want to parse and I don't want to split hairs too finely. I can tell you that there was not a process, as I said before, where anybody sat down and went through MOIs, at least post -- where anybody sat down and went through MOIs with a specific purpose of identifying discoverable information. We -- as I said before, we discussed it regularly, both in the context of identifying discoverable information and implementing the Court's order to designate Brady material, but there was not a process where we sat down and systematically reviewed the MOIs that were coming in in the way that you described.

MR. SCIORTINO: The only other relevant portion of the Ogden memo that I can think of is the -- I can get the exact requirement. The Ogden memo expresses a preference for turning over source material in discovery, but expressly allows for summaries, which is what you did in this case, but it does say that -- let me get the exact line, I'm sorry. It does say that prosecutors are directed to make sure that the full scope of pertinent information is provided to the defense.

So you can do summaries, but you have to take what is characterized as great care to ensure the full scope of pertinent information is provided to the defense.

Was that done with respect to your summary?

THE WITNESS: I would say -- and again, I would like to, with regard to Witness #8 take a closer look at that. With regard to the statements, the summary on Witness #7 and the summary on Witness #13 are we going to go through those memos? I have --

MR. MASLING: I sent you Zuckerman's -- we asked Zuckerman, tell us what information in those disclosed MOIs that you thought was exculpatory, and they covered Witness #13 and Witness #7 So I don't want to go through it, but if you want to go through, it's in the materials that I sent you, and when you review the transcript or any other time before we finish, if you look at that, that's fine.

MR. SCIORTINO: The concern is that you described a process by which the MOIs would come in, and you said you were not able to, due to the crush of preparing for this monster trial, able to review them line by line for discoverable information. Instead, you as the trial team kind of relied on your collective

memory of the interviews without recourse to the --

THE WITNESS: That's accurate.

MR. SCIORTINO: My question to you is: Do you believe that that complied with the Ogden memo's obligation to take great care for the full scope of pertinent information to summarize for the defense?

THE WITNESS: Certainly our process fell short of the requirements in the memo. If there were -- and on Witness #8 -- I'm not trying to be evasive about Witness #8 I think it's significant that Witness #8 was in a different mine, in a different mine group. I don't know that as I sit here right this second, I can answer that question about Witness #8

On Witness #7 and Witness #13 I don't recall information in their memoranda. I don't recall information from their interviews that we didn't accurately summarize. Look, I mean, my suspicion is that, even when I take another look at the Witness #8 memo, even in light of the fact that Witness # wasn't at that mine, there are things that we should have stated differently in the summary. I won't disagree with your view, Mark, that it would have been more helpful to the defense to, and more compliant with the full scope requirement of the Ogden memo that you just quoted, John, to say -- to quote the language

from the MOI directly.

MR. SCIORTINO: Or just provide it.

THE WITNESS: Or just provide the MOI.

MR. SCIORTINO: Were you and the rest of trial team -- I guess I should say were you taking more of a holistic approach when you were thinking about post-indictment memoranda to disclose, like, you would go back and remember, yes, was it -- how do you say that Witness #2 name, the one that was disclosed.

MR. MASLING: Witness #2

THE WITNESS: Witness #2

MR. SCIORTINO: I remember that was quite good for the defense, so we are going to disclose that in its entirety. Witness #3 on the other hand, was basically a prosecution witness, and while Witness #3 may have said specific lines here and there that could be cherry picked and be helpful for the defense, overall, Witness #3 was a strong prosecution witness whether we call Witness #3 or not.

So, in your mind, that one wasn't really necessary to be disclosed?

THE WITNESS: I'd say that's an accurate description of how we approached the process.

MR. SCIORTINO: Okay.

BY MR. MASLING:

Q. We are getting close. One little question, then a bigger set of questions, then we'll be done, at least I'll be done. This goes to the issue of whether the material that wasn't disclosed before trial might have been available to the defense from other sources.

So we were told that for the following witnesses, whose MOIs weren't disclosed, that there was no other source of information for them available for the defense, so no memorandum of interview, no grand jury transcripts, no MSHA transcripts, no immunity agreements, proffer agreements, no voluntary productions for Witness #3 Witness #15 Witness #7 Witness #8 Witness #16 and Witness #1

Does that sound right? And Paralegal #1 told us that.

A. If Paralegal #1 checked the list. I suspect Paralegal #1 list is right.

Q. Have you seen the letter, the disclosure letters that went to Zuckerman from the U.S. Attorney's Office?

A. Yes.

Q. You saw they provided charts that said, well, we didn't give you this, but we did give you this, this, this and this, but there was nothing for those six witnesses.

A. Okay.

The only thing that I would add to that is that for most or all of those witnesses, there was contemporaneous -- there were contemporaneous documents, e-mails, faxes and so forth between Blankenship and those witnesses that reflected communication with those witnesses.

To take a hypothetical example, if the complaint is that witness X -- we didn't have anything from witness X, and witness X talked about the hazard elimination program and what a great thing it was, or Massey's safety innovations that Blankenship had pressed and what great things those were, there, in many cases, would be correspondence that reflects the same thing, that reflects -- to put it concretely -- and I don't know if Witness #10 was on the list or not.

Q. No.

A. But to put it concretely, in the case of Witness #10 Witness #10 for example, there is extensive correspondence in which Witness #10 and Blankenship talk about the hazard elimination program. Witness #10 didn't have an MOI, so Witness # wouldn't be on the list. But my point is I don't have any reason to disagree with that list, if that's Paralegal #1 list.

Q. Okay.

A. I would add the caveat that there, for many of these witnesses, there were lots of documents disclosed that would have given the defense insight into what those witness were involved in.

Q. All right. Last topic for me. So --

A. Mind if I have a quick break before we start this?

Q. Oh, sure.

* * *

(Brief break)

* * *

MR. SCIORTINO: On the last point about these various witnesses for which the defense didn't have any other source of information besides the MOIs, it's possible also that that content was maybe not available through those witness, but was redundant to other content disclosed in discovery or in evidence at trial. For instance, as you said, they could have all talked about the -- what was it called?

MR. MASLING: Hazard elimination.

MR. SCIORTINO: Or kill the spider. So they could have all been talking about the same stuff that other witnesses had talked about.

THE WITNESS: I think in most of these cases, that is the case. Maybe they are, but I don't think that even Zuckerman is going to be able to point to lot of examples of things that some witness said that wasn't disclosed by another witness or disclosed in the documents that were produced.

MR. SCIORTINO: Or that some of these were closely associated with the defense, so they could have had direct access to them?

THE WITNESS: That's right. And I know of some that they had direct access to. I know that they interviewed Witness #7 I know that they interviewed Witness #3 from conversations with the counsel for those witnesses.

MR. MASLING: It has to be, otherwise they would not have kept asking you for her MOI.

THE WITNESS: Right.

MR. SCIORTINO: That's all I have.

MR. MASLING: So here is the last exercise. Rather than go MOI by MOI by MOI, we kind of pulled out bullet points that were either in one or usually multiple MOIs that weren't disclosed. And what we did is we asked the two agents and the two AUSAs that we spoken with for their views about whether these statements taken in isolation would have been helpful to

the defense to have been disclosed.

And I want to give you the same opportunity to give us your views. And, at this point, I'm only going to tell you -- I'm going to leave out the ones where they say, no, it's not helpful because if they all agree it's not helpful, then we are going to say it's not helpful. But I want to ask you about the ones that they say, yes, that would have been helpful for the defense to have known.

First, "Blankenship was willing to spend money to increase the safety of workers."

A. So can -- I mean, looking at it in isolation, I can give you a two-part answer. Number one, that was certainly redundant with lots of evidence that was disclosed. Is that a statement that, in isolation, is helpful to them, yes, but there was already a great deal of evidence that was used over and over again at trial that we had disclosed to them about money that Blankenship spent on safety, programs that he put in place, equipment that he had altered and modified for supposedly in the service of safety, rewards programs that he used with employees to supposedly encouraged them pursue safety. So in isolation, yes, but I do not believe that the disclosure of that statement from one

additional MOI would have added anything to what they had.

BY MR. MASLING:

Q. "Blankenship wanted to see the number of violations or citations reduced."

A. So I would give you the same answer to that. You know, there was just a mountain of evidence of statements that Blankenship made that -- in which he claimed to want safety violations to be reduced. And we didn't dispute that he made the statements. In any event, there was plenty of evidence on that point. One more from another MOI or a couple more MOIs would have been one or two more.

Q. But in isolation --

A. In isolation, that is a statement that I would say would tend to be helpful.

Q. "Blankenship wanted information about Massey and UBB violations in order to be able to reduce them."

A. Wanted information about violations in order to be able to reduce them. Was it Massey generally or UBB specific?

Q. Both.

A. Okay.

My answer to that is probably going to be the

same. That --

Q. Okay.

A. -- in isolation if there were the only place where that statement occurred, then it probably would have been helpful to the defense. But it was certainly redundant of a great deal of evidence that was produced. And just let me pause for a minute there on the question of -- on the subject of intent.

It's -- and Zuckerman is certainly going to make the case, but it seems to me significant that for statements like this, which are variations on the theme that Blankenship wanted violations reduced, wanted safety improved, you know, we turned over such an enormous volume of evidence on that subject, which formed the centerpiece of their case really at trial.

It's just hard for me to -- hard for me to swallow the claim that we intentionally withheld memoranda that added one more data point on these issues to the enormous amounts of original evidence because we thought it was going to make a differences to the outcome of the case. It's just not there.

Q. "Blankenship wanted workers to comply with applicable federal regulations."

A. Again, in isolation, that is a statement that

would tend to be helpful to the defense, again, if it was an enormous amount of evidence that was disclosed on the same point.

Q. "Blankenship started a program to reduce violations and citations and to teach workers better safety practices."

A. Same answer.

Q. And we talked about this one. This was only in one MOI. "Blankenship did not want production targets to be too aggressive."

A. This is the Witness #3

Q. Yes.

A. The answer that I gave on that when we talked about the memo is what I would say now.

Q. Okay.

"Blankenship wanted information about who was committing violations."

A. Same answer as to the earlier one. Again, in insolation, he wanted information about who was committing violations. You could -- it is a piece of evidence that the defense could use to make an argument. Now -- and I understand we don't get to evaluate whether the argument is any good necessarily in light of the totality of the evidence, but that's information -- I'm

not saying that we looked at these statements and say, well, they got this from other source, we don't have to produce it, but, the fact of the matter is they did get that, again, from original documents that were Blankenship's original correspondence to them.

Q. "MSHA decisions -- some MSHA decisions made conditions in the means more dangerous than they otherwise would have been."

A. Some MSHA decisions made conditions in the means more dangerous than they otherwise would have been.

Q. I think it's like the Witness #13 ventilation issue where Witness #13 saying I thought what they were requiring us to do is make the thing more dangerous.

A. It's funny, we -- I didn't think that that whole line of questioning from Witness #13 was relevant to the question of whether or not Witness # was violating the safety laws. Whether or not you think MSHA makes things more dangerous, Witness # was not -- you know, Witness # was not on trial for making the mine more dangerous or not more dangerous. The issue was violations of mine safety laws. And that one, I'm not sure that I think that one is actually helpful to the defense in defending against the charges in the case.

MR. SCIORTINO: I guess it's kind of a jury appeal type of thing.

THE WITNESS: Sure.

BY MR. MASLING:

Q. "Violations written by MSHA inspectors are reflective of opinions but not facts."

A. Again, I don't know if that's that helpful or not. I think that's true in any regulatory situation, that a regulatory exercises some degree of judgment. I don't know if that's a defense.

Q. Okay.

"MSHA was aware of dangers, but didn't take any action in response to being aware of them."

A. Again, I don't know how that relates to what he was charged with.

Q. "UBB operations met minimum regulatory requirements."

A. Do you know what the context for that was?

Q. I don't. Generally, it was followed by, but they didn't exceed them. There was more than one person that said, well, we met the minimum standards for X. We didn't exceed it, but we met the minimum.

A. It's hard to say without context. UBB met the minute minimum regulatory requirements. For the record,

let me add that as a caveat to all of these. There may be context to all of these. There may be context for these that when you look at the statement that changes the meaning of the statement from when you view it in isolation.

Q. I tried not to do that, but I can't guarantee that that didn't happen?

A. UBB met the minimum regulatory requirements. Do you know who said that?

Q. I don't.

A. The reason I'm pausing is if you look at their violation history, I can't even imagine what that would have meant.

Q. My assumption, and I don't remember is that it's some higher-level person, like a president or vice president or somebody at headquarters.

A. If you take that statement literally in isolation, strip it out and you have a witness who says UBB met the minimum regulatory requirements in the face of all of the evidence of their safety violations then I suppose --

MR. SCIORTINO: I think Witness #4 said it.

THE WITNESS: Did Witness say minimum regulatory requirements? I mean what Witness #4 said if this is

what -- what Witness #4 said about minimum requirements is that Blankenship would staff the mines at the absolute minimum --

BY MR. MASLING:

Q. It probably was Witness #4

A. -- at the absolute minimum necessary for perfect conditions, which ensured that, since there were no perfect conditions in real life, there were going to be violations. That was part of Witness #4 Keebler analysis of Blankenship, where [redacted] said [redacted] started a Keebler and [redacted] thought of everything in terms of numbers and if you add a certain number -- that [redacted] essentially staffed the mines in a way that did ensure violations. I don't know if that's what [redacted] meant by that.

Q. I don't know.

A. So I guess my answer is that one to me seems completely context dependent, but if a witnessed just said UBB met minimum regulatory requirements, period.

Q. So this appears to come from this is a -- where does that come from? So there was enough there to meet the minimum requirement, that was from Witness #4 the long-wall face was staffed for perfection, from the same MOI page.

MR. SCIORTINO: Is that what you were kind

of saying?

THE WITNESS: Yes. What Witness #4 saying -- I mean, my interpretation of that, and I'm confident that's what Witness # meant, is that Massey was staffed to meet -- UBB was staffed to do the absolute minimum if everything was perfect, but that nothing was ever perfect in real life, so violations were guaranteed.

BY MR. MASLING:

Q. Okay.

A. I don't remember -- again, I could have remembered -- Witness #4 acknowledged that there were lots of violations. I don't know that Witness would have said -- actually, said Massey met the minimum regulatory requirements generally.

Q. "UBB was a well-run mine."

A. I think from Blankenship's point of view that was true. A well-run mine from Witness #4 perspective is one that made a lot of money. I don't know if that's what that means.

Q. So not helpful.

A. I mean, if the statement was that UBB was a well-run mine with regard to complying with the law, then, yes, but not if the statement was if it was a well-run mine with regard to something else not that Witness #

was charged with.

MR. SCIORTINO: Too ambiguous to be helpful perhaps?

THE WITNESS: Sure. Until it blew up, I think Blankenship would have said that UBB was run fine because it was printing money.

BY MR. MASLING:

Q. You know MSHA inspector would write reports based on their inspections and from time to time, they would write positive comments about the mine and the Witness #11 blurb was an example of that, well-run mine they are trying to do a good job or something like that. So in various places in some of these undisclosed MOIs, there are statements about positive evaluations from MSHA inspections.

The question is: Would that have been helpful to the defense, kind of like a snapshot on this day at this time, I had something positive to say about the mine?

A. Would it have been helpful? Arguably, marginally. I don't know that it goes to the issue of -- and a part of our view, and this is another subject that we talked about, me and the U.S. Attorney, and I'm fairly sure AUSA #1, and even briefed, I

believe, in some of the motion practice is that it just wasn't -- it's not relevant.

It's not a defense to say that there were times when the mine did things right. We equated it to -- you know, we equated it to a bank robbery case in which the bank robber wants to say that he drove past -- you know, he didn't rob banks on the other 30 days of the month, and that's just not -- that wasn't something that was relevant and is not from a legal standpoint, at least, shouldn't be helpful to the defense.

Q. I'm not sure this is the time to get into the discussion of whether that's an apt analogy. I'm not entirely convinced that that's an apt analogy, but okay.

"UBB had a decreasing number of infractions."

A. Do you know what the context was?

Q. I think after the kill the spider thing the number of infractions went down.

A. I don't know who said that. It's not accurate. Again, I suppose if somebody said it and you take it out of context and say UBB had a decreasing number of infractions, period, even if it's just flatly not true, I suppose you could say it's helpful to the defense, but not helpful in the sense that they had, and we had disclosed to them all of the same numbers that we

had that actually showed what had gone on with regard to safety at the mine.

Q. "MSHA was bias against Massey versus other companies."

A. Again, if -- not knowing what the context is you take that statement --

Q. That's pretty straightforward. And this goes with the next one, "There is no difference between conditions at the UBB mine and any other mine in any other coal mining operation. It's all the same, you can't run a perfect mine, and if there's more violations, it's because they are picking on you because they don't like you for whatever reason they don't like you."

A. So taking those separately, the one you just read that MSHA was bias against Massey, taking it in isolation could be helpful to the defense was covered abundantly in all kinds of evidence that we disclosed. That was a commonly held view stated in writing by Witness #10 by Blankenship, by lots of others. The next one that you mentioned, if the statement is that UBB is no different than any other mine?

Q. In terms of the number of violations, both the quality and quantity of violations.

A. To me, that is -- that doesn't really bear on the question of whether or not the law was being broken at UBB.

Q. "Violations were not intentional."

A. Again, I think context is important, in that violations were not intentional on the part of workers at the mine because they are put in circumstances that make it impossible for them to follow the law, that's helpful to us. That's inculpatory. If the statement is that Blankenship didn't intend any violations to happen.

Q. I think it's the latter or Massey management.

A. If the statement is that Blankenship didn't intend any violations to happen, then a statement like that, I suppose would tend to be helpful to the defense, but without context it's hard to say.

Q. Last one on my list, and I think this came from Witness #8 and [redacted] said, "The violation weren't due to manpower shortages they were due to inexperienced workers."

A. That's 100 percent specific to his mine, which was a completely different operation from UBB. I don't know how [redacted] could have possibly commented on manpower shortages at UBB.

Q. I thought your whole theory of the case was

that Blankenship was too cheap to staff it appropriately? Not your whole theory, but that was one of your points.

A. That is a point, but the point was about his staffing at UBB. [redacted] for all I know -- do I think that it's true that [redacted] where Witness #8 [redacted] Witness #8 [redacted] was abundantly staffed, probably not. But even if it was, I don't think it changes the evidence of what happened at UBB.

MR. MASLING: Okay.

MR. SCIORTINO: I have some follow-up about the Ogden, but I don't want to jump topics.

MR. MASLING: Jump topics.

MR. SCIORTINO: Specifically with U.S. Attorney Goodwin, was he broadly aware or specifically aware that memoranda of interviews post-indictment were not being reviewed?

THE WITNESS: The interview of memoranda post-indictment were not being reviewed. I don't know that we had a specific conversation about it, but based on the conversations that we did have -- it was clear when we discussed the subject of what to put in these letters, that we were having that discussion based on our recollections of witness interviews.

I mean, there would have been -- there would have been no reason for him to believe that there was a systematic process in place to -- the evidence, I guess, based on -- the evidence that he would have had, based on our discussions, was that we were working from recollection and that neither he nor I nor anybody else undertook to put in place a process where we systematically reviewed each MOI for discoverable information.

MR. SCIORTINO: Can you, just in narrative terms, give us an understanding of what his role was? Was he the first chair? Was he kind of the big picture guy, leaving the nuts and bolts to you, or was he directing things on a day-to-day basis?

THE WITNESS: In pretrial --

MR. SCIORTINO: Like who does the buck stop with, is it you or him.

THE WITNESS: So I would say the decision-making authority on decisions of any significance rested with him. The work -- sort of the grunt work of preparing for trial was largely me, but -- and in particular, you know, he was -- the case was very important to him, and not without reason. It was obviously a significant case.

And he made clear from the beginning, that, like I said, any decision of significance had to be made by him, and he reiterated that more strongly around the summer of 2015. And that conditioned through the pretrial process and all the way through trial. Now, in terms of who sat where at trial, I sat first chair and opened and did the rebuttal close and took more witnesses than him, but the decision-making authority was his.

MR. SCIORTINO: Who would you say is responsible for their not being a process to ensure that the Ogden memo was complied with, with respect to these memoranda?

THE WITNESS: It was, I would have to say, a lapse by all of us.

MR. SCIORTINO: Okay.

THE WITNESS: You know, it, in retrospect, should have been done, wasn't done. And you know, I, in retrospect -- I certainly wish that I had been more, you know, more specific with him about the need to do that, rather than -- I mean, we did talk frequently about the need to make sure we had adequate resources and processes in place for discovery, which didn't lead to much of anything, but in retrospect, it was the failure

to put a better process in place is probably a failure of the rest of the team.

MR. SCIORTINO: But for his instructions to you that we are only going to give to the defense what we have to give to the defense -- in other words, if he was not involved in the trial and you were -- it was your case entirely, do you think you would have turned over the post-indictment memoranda in their entirety.

THE WITNESS: I think if we hadn't had the conversation -- if he and I hadn't had the conversation in which he said that we don't need to produce these in their entirety, we can summarize what's exculpatory, I would have just kept doing what I was doing, meaning produce stuff as it comes in.

MR. SCIORTINO: It certainly seems like it would have been a lot easier.

THE WITNESS: Yes, it would have. And like I said -- and I understand why you are going through the list of those statements that jump out from those memos, but there is just nothing there that -- and I don't know if you all have read -- I hope you haven't had the burden of reading the entire trial transcript --

BY MR. MASLING: --

Q. Not yet.

A. -- but there is nothing in there that would have made the least bit of difference at trial. And you've seen enough of Zuckerman to know that if they thought that there was even a glimmer of possibility that anything in there would have made a difference in the outcome of the case, they would have been in there with a motion while he was still in prison.

Q. I don't know what they are doing.

A. They fight -- I've never seen anybody litigate like them. Every single little thing, meritorious, meritless, whatever. If they think that an argument is too weak to even take a run at it with the court, then you know it's weak.

MR. SCIORTINO: I would like to take five minutes just to review notes.

* * *

(Brief break)

* * *

MR. SCIORTINO: So Mark mentioned that we are probably not going to have the opportunity to talk to Mr. Goodwin directly. Is there anything that you can tell us that might help fill in that gap that you think would be important for us to know?

THE WITNESS: Why he doesn't want to talk

to you?

MR. SCIORTINO: No, just anything that we could have gotten from him directly that you can help us with directly.

BY MR. MASLING:

Q. Tape recordings of his phone calls, just to go with a pattern in this case?

A. No. Like I said, if you guys have got the e-mails, that's it.

Q. But, as you said, you didn't communicate much by e-mail because you were walking down the hall?

A. Yes, he was right there, I was right there. If you need to corroborate, his assistant at the time will tell you that I was in his office multiple times daily for long stretches, and he was in mine during the course of this case. It's just when you are sitting that close to somebody, unless you are sending them a long document to review, it's a little odd to communicate by e-mail and not particularly efficient. It's just not a lot of e-mails between us.

MR. SCIORTINO: Was his status of U.S. Attorney awkward for you?

THE WITNESS: Was his status of U.S. Attorney awkward for me? Yes.

MR. SCIORTINO: I'm thinking I never had to try a case with a U.S. Attorney. It seems to me like I would not have enjoyed it.

THE WITNESS: [redacted] I just think that this case is just too many challenges for an office our size.

And it was -- part of what motivated me to do that, and I didn't say, was that it just too -- you know, it was too difficult to try to handle the case with him over your shoulder micromanaging decisions. [redacted]

MR. SCIORTINO: I'm sorry.

BY MR. MASLING:

Q. Our last question, as I mentioned is: Is there anything we haven't discussed today that you think is relevant to our assessment of these conduct allegations we are looking at?

A. I'll say, as I said a minute ago, I have not searched since the -- I did searches of the document

database, in putting together my response to your first set of questions. I think there was another set after that --

Q. Yes.

A. -- that I included documents with.

Q. Yes.

A. I have not done searches of the document database to see if there are documents that would -- or identify documents that would make what was in these MOIs redundant. I think the documents are there, I think I can probably pick them out from the trial exhibits because almost everything from the list that you read was a central theme.

The list of points that were made in these MOIs was a central theme of their case, that they supported, at great length, with materials that we did provide them. I don't know if that matters to what you guys are trying to do or not, to see how extensive our disclosures were on the same subjects that they are complaining about now. I know it's not the end of story. I don't know if it's a component of what you are looking at.

Q. I can't tell you not to do it. It's not going to hurt anything if you do it. I'm not clear at this

point how much it would help, so I guess I'm going to leave it to you for the moment, and then we'll go back and we'll talk to our folks, and if they say, you idiot, of course you need to do that, and you need to do it right away, I'll let you know, but you can tell us now, yes, you are going to go through that exercise, and it's not going to hurt.

A. Yes, I'll do it. Is there a list that I should look at of subjects?

Q. I sent you a list a long time ago, and that had kind of -- but that was partial so what I'll do is I'll send you a supplement to that.

MR. SCIORTINO: That table that Paralegal #1 made would probably be helpful, the color-coded one.

BY MR. MASLING:

Q. That's incomplete. So let me send you a supplement to that list, but if you want to start working on it after we are done here, that will keep you busy for a while?

A. I'll block out an hour every night.

MR. MASLING: So we are done. Thank you very much, greatly appreciate it.

(Whereupon, this proceeding was concluded at 2:59 p.m.)

THE STATE OF :
WEST VIRGINIA :
: SS: C E R T I F I C A T E
COUNTY OF OHIO :

I, [redacted], Professional Court Reporter and Notary Public within and for the State of West Virginia, duly commissioned and qualified, do hereby certify that the within-named witness, STEVEN RUBY, Esquire, was by me first duly sworn to testify to the truth, the whole truth and nothing but the truth in the cause aforesaid.

I do further certify that the within testimony was by me reduced to stenotype in the presence of the witness; afterwards reduced to Computer Aided Transcription under my direction and control; that the foregoing is a true and correct transcription of the testimony given by said witness; and this deposition was concluded without adjournment.

I do further certify that I am not a relative, counsel or attorney of either party, or otherwise interested in the event of this action.

I, to the best of my ability, do further certify that the attached transcript meets the requirements set forth within Article 27, Chapter 47 of the West Virginia Code.

IN WITNESS THEREOF, I have hereunto set my hand and affixed my seal of office at Wheeling, West Virginia, on the 25th day of October, 2017.

_____
[redacted], Professional Court Reporter, Notary Public within and for the State of West Virginia

My Commission expires:
June 19, 2022

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[redacted]

May 24, 2017

The Honorable Robin C. Ashton, Counsel
Office of Professional Responsibility
United States Department of Justice
950 Pennsylvania Avenue, N.W., Suite 3266
Washington, D.C. 20530

Dear Ms. Ashton,

Thank you for your May 23, 2017 letter. I am not surprised that Bill Taylor has, yet again, tried to put the trial team in this important case on the defensive. Shortly after the indictment, Mr. Taylor went directly to and gained an audience with DAG Cole to complain about the prosecution. Please see the attached letter from me to DAG Cole. It was against the backdrop described in that letter that it was my intention and direction that Mr. Taylor have nothing about which he could reasonably complain concerning our investigation and prosecution. I know Mr. Taylor is not alone in trying such maneuvers—I just wish they were not effective.

Of course, I have been gone from the office a year and a half, so I do not have at my disposal the case file—but I gather you have that already. However, I do know that we provided expansive discovery to the defense—well beyond that which we were required to provide—including perhaps hundreds of memoranda of interview. Indeed, it was my intention and direction to the lead AUSA, Mr. Ruby, that all information we gathered during the lengthy investigation be provided. In fact, I believe the defense actually complained about the volume of information we produced. If anything was not produced, I am confident it must have been inadvertent.

I also cannot imagine that if any material was not produced that such material contained anything new that had not already been disclosed to or more available to the defendant. Significantly and specifically, I am not aware of any exculpatory information concerning Mr. Blankenship, and accordingly, I certainly do not know of any exculpatory information not being disclosed.

It is frustrating to me if memoranda of interview were not turned over. My frustration is not born from any concern that any information contained therein would have made any difference in the outcome or fairness of the trial, because I

[redacted]

have no such concerns. Rather, I am frustrated that Mr. Taylor could finally succeed in putting on the defensive a trial team who took on a tough, worthy and just case. I trust that you will not allow that to occur.

Thank you again for your letter and for your long and distinguished service to our nation.

Sincerely,

R. Booth Goodwin II

United States Department of Justice

United States Attorney
Southern District of West Virginia

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November 22, 2014

Via Email: [redacted]@usdoj.gov

The Honorable James M. Cole
Deputy Attorney General
United States Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530-0001

Re: United States v. Donald L. Blankenship

Dear Deputy Attorney General Cole:

Yesterday, I received a letter from William Taylor, who represents a former coal executive named Don Blankenship in a case in my district. I believe that you have also received the letter, and I understand that Mr. Taylor has managed to speak with you directly. I am not surprised, unfortunately, that Blankenship's high-powered defense lawyer would attempt to exploit his Washington access to attack me and my staff personally. This is regrettable but predictable, especially in a case where the actual evidence is as strong as it is here.

I must admit, however, that I was surprised that Mr. Taylor could so quickly win a private audience with you to complain that he and his client were not accorded special treatment—that is, prior review at the highest levels of the Department of the charges in this case, something obviously not available to ordinary defendants or defense lawyers. And I was surprised that immediately after Mr. Taylor sent his letter, Mr. Goldberg called me to suggest that I am expected to respond. I do not believe that Mr. Taylor's bid to pull strings warrants a response, so his apparent ability to set the Department's agenda in this matter concerns me.

If Mr. Taylor has already succeeded, however, in his strategy of putting the prosecutors on the defensive, here is what you should know: Shortly after the explosion at the Upper Big Branch mine killed twenty-nine coal miners amid evidence of rampant law-breaking, Mr. Taylor made an impromptu visit to my office, apparently to fish for clues as to where our investigation might be headed. Along with one of my assistants, I met with him. Mr. Taylor probed to discover what we might have learned about his client Blankenship, the longtime CEO of Massey Energy Company, which ran the mine.

As one would expect, we declined to provide details of our investigation in response to Mr. Taylor's inquiries. With Blankenship, obstruction and tampering were paramount concerns. In a previous investigation of criminal conduct at one of Blankenship's companies—conduct that led to the deaths of two coal miners and a criminal guilty plea by a Massey Energy Company subsidiary—and in the early stages of the Upper Big Branch investigation, witnesses had told us of Massey's pressure to prevent cooperation with the authorities. With that in mind, when Mr. Taylor

said that he wanted to be kept apprised of his client's status as the investigation progressed, and to be given detailed information about our case as it developed, we remained noncommittal, leaving the door open to future discussions if they served the best interests of the case but not binding ourselves. We took the same approach, for the same reasons, on the one or two subsequent occasions, a couple of years ago, when Mr. Taylor called our office to probe some more. Suffice to say that our understanding of these conversations differs from the one that Mr. Taylor has professed, and that we have quickly learned to deal with him only in writing.

Although we did not share details of the investigation with Mr. Taylor, he apparently remained aware of them through contact with witnesses whom we interviewed. We know that shortly before charges were presented against Blankenship, Mr. Taylor had learned enough about the investigation's progress to obtain, pursuant to an agreement between Blankenship and Massey's successor company, many of the very documents that were presented in the grand jury—and others to which we have been denied access on grounds of privilege. His claims of surprise are hyperbole.

Contrary to Mr. Taylor's assertion, the United States Attorneys' Manual lists many reasons not to notify a defendant in advance that he is the target of an investigation, and most or all of them apply here. USAM 9-11.153. Significantly, and in addition to the risk of obstruction explained above, the presiding magistrate judge found earlier this week that Blankenship poses a serious flight risk, a fact of which we were well aware when charges were presented.

Mr. Taylor's attacks on the indictment are similarly unfounded. I have been personally involved in this case from the outset; I know the facts and the charges. I thoroughly reviewed the indictment and personally appeared in the grand jury for its presentation and the presentation of the powerful evidence in support of it. The laws being applied are familiar ones. If there is any novelty in this prosecution, it is only the notion that the laws on coal miners' safety apply to CEOs just as fully as to rank-and-file miners. Notably, when the Attorney General visited my district months ago, I informed him and his counselor, Channing Phillips of the charges to be brought in this indictment and received their support. Neither of them asked me to subject the case to further review by the Department before it was presented. Days before the indictment was presented to the grand jury, I forwarded an "urgent report" and followed up with Mr. Phillips, and I understand that he updated the Attorney General on the case at that time. Mr. Taylor's suggestion that I acted without prudent consultation with Department officials lacks merit.

If Mr. Taylor objects to the indictment, he should assert his objections in court, just as other defendants do. His apparent belief that wealthy defendants or their powerful lawyers are entitled to special, detailed, pre-judicial or extrajudicial scrutiny of charges by high-level Department officials—a process unavailable to ordinary defendants—is offensive and deeply corrosive to the basic ideals of our justice system and our Department.

With this response, I hope that you will consider this inquiry closed. Our case is a strong one and a just one, and Mr. Taylor should not be permitted to use his contacts at the Department as part of his plan to bury us in paper and prevent us from preparing for trial.

Sincerely,

R. Booth Goodwin II
United States Attorney

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STEVEN R. RUBY
[redacted]

May 7, 2018

Robin C. Ashton, Esq.
Counsel
United States Department of Justice
Office of Professional Responsibility
950 Pennsylvania Ave., NW, Ste. 3266
Washington, D.C. 20530

Re: Don Blankenship matter

Dear Ms. Ashton:

Neither of the reckless disregard findings in OPR's draft report is justified. The one regarding duty of candor is the more obviously flawed of the two, so I will begin there and then turn to the duty to disclose.

Duty of candor: Analysis of statements cited in draft report

The draft report's duty of candor conclusion rests on parts of sentences from three briefs plus a sentence from the trial transcript. Crucially, the draft report acknowledges that these statements were themselves accurate. But it concludes that the Court naturally would have read them to mean something other than what they actually said: That *every* memorandum of interview ("MOI") had been produced, when in fact a relatively small minority (60 or so out of around 400) had not been.

That conclusion fails for two reasons: One, the question of whether every MOI had been produced was not part of the context in which those statements were made. When the statements are viewed in context, there is no reason that unproduced MOIs needed to be raised to make the statements complete. And two, the draft report misunderstands a basic fact about how lawyers and judges read legal arguments: These readers know that lawyers speak precisely and make the strongest arguments that they can support. If a legal argument asserts that one has "reviewed precedents," it thus does not imply that one reviewed "every precedent that could be found." Quite the opposite: The reader recognizes that if the attorney could have made the latter, stronger statement, he or she would have. So if a lawyer says that he "produced 302s," it is emphatically *unnatural* to read it to mean that he produced *every* 302. The absence of an absolute qualifier would imply just the opposite, for if the lawyer could have accurately said that *every* 302 was produced, he would have. At the least, it is not reckless for a lawyer to assume that a judge will give his words a limited interpretation when

the context does not suggest a broader one. And here the contexts did not suggest an interpretation beyond what the words themselves said.

The February statement. The first statement with which the draft report finds fault is one from a February 2015 brief. The brief stated that the prosecution had already produced "extensive discovery material," including "over 600,000 documents" as well as "FBI 302's." It did not purport to say that *every* document or *every* 302 had been produced.

The statement was true. And contrary to the draft report's view, it would not have been natural to read the brief to *imply* more than it said. The statement regarding the 302s was offered as support for the point that the discovery already produced was "extensive." "Extensive" is not "total," and as noted above, one would expect the prosecution to describe its discovery production in the strongest possible terms. The most natural reading of the word "extensive," in context, thus would recognize the possibility that something less than every document had been produced.

The draft report cites a February 19, 2015 email to show that I reviewed the February statement. [redacted]

The May statement. The next statement highlighted in the draft report is from a May 2015 brief. The May statement was made in response to a defense request for the agent notes "underlying" MOIs that the prosecution had already produced, because the defense claimed that the MOIs "sanitized" the underlying notes.[1] In other words, the defense was asking for interview notes to compare to MOIs that it already had. Such requests for notes are common. The prosecution produces MOIs and the defense then seeks the notes corresponding to the MOIs to see if anything can be gained by comparing them. The corresponding government response is also common: The defense was not entitled to the MOIs in the first place, much less the underlying notes. That was the response here: The prosecution produced the 302s that we produced, even though it need not have, and it was not obliged to produce the notes that underlay them.

In that context—a request for notes to compare to 302s already produced—other 302s that had not been produced were simply not part of the discussion. The most natural reading of the statement that the government had "produc[ed] . . . typed 302 reports" was not that every 302 had been produced, but instead that the statement did not address that question. At the time, it would not have occurred to me that it needed to.

I did not prepare the May brief, but the draft report notes that my electronic signature was on it. As OPR is no doubt aware from its review of the case, that does not mean that I reviewed the brief in any detail; I was often too busy with other work to do so, and OPR cites no evidence that I conducted a detailed review of the May brief.

[1] *Blankenship* ECF 248 at 1, 3.

The July statement. The next highlighted statement is from a July 2015 brief, which the draft report says I prepared.[2] The context was the same as the May statement: a request for notes to compare to MOIs that had already been produced. The pertinent defense brief made even clearer that these comparator notes were what it was seeking.[3] And the prosecution response was similar: Memoranda of the interviews in question had already been produced, and the defense had no entitlement to those notes.

As with the earlier statements, the issue of whether every MOI was produced was never raised and never occurred to me as part of the discussion. Indeed, the July statement was even less susceptible than the May statement to the reading that the draft memo proposes: It said, "the United States has produced memorandums that reflect the substance of well over 300 witness interviews." It is difficult indeed to see how *that* statement, which sought to quantify the number of MOIs that had been produced, could naturally be read to mean that *every* MOI had been produced.

The trial statement. Finally, the draft report cites part of a sentence from the trial transcript. After the testimony of Witness #4 , the defense claimed that the prosecution knew and should have disclosed that Witness #4 would deny being part of a criminal conspiracy. I responded, correctly, that the accusation was false, and that "[t]he testimony that the witness had given us and the statements that [redacted] had given us previously" did not lead us to believe that [redacted] would make such a denial.[4] Indeed, on redirect, Witness #4 testified that [redacted] did not even understand what a criminal conspiracy was.[5] As part of my response, I also stated that the prosecution had produced grand jury material and 302s regarding Witness #4.

As the draft report is quick to point out, this response was technically off base—by a single letter, the "s" after "302." At the time I spoke, I did not have a tally handy of Witness #4 302s that had been produced. I thought it was more than one, hence the plural "302s." The draft report concludes that I genuinely that belief. In fact, only one 302 had been disclosed, but my error in that regard was no violation of the duty of candor.

The draft report, however, asserts that I should have realized that when I said "302s," the Court could naturally believe that I meant "all 302s." Just as with the other three statements, this conclusion does not withstand scrutiny. The purpose of my statement, viewed as a whole, was to tell the Court that I knew of no undisclosed exculpatory information regarding Witness #4 (Which was true.) Nothing about that context raised an issue of whether every 302 had been disclosed, and nothing about it prompted me, in the

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[2] If the draft report says so, I have no reason to dispute it, though for the most part I do not recall which briefs I drafted. I do recall that many briefs were collaborations, with more than one attorney contributing language to them.

[3] *Blankenship* ECF 283 at 5 n.2 ("[T]here is clearly room for misunderstanding or outright error when the agent transfers information from his or her rough notes to the final memo; and . . . the rough notes might be more credible and favorable to the defendant's position." (internal quotation marks, citations, and ellipses omitted)).

[4] Trial Tr. 3712.

[5] *Id.* 3327.

midst of making an argument on my feet in court, to consider even for a moment whether that question was pertinent.

On the contrary, by that time, it was clear that defense counsel *knew* we had conducted interviews with Witness #4 from which no MOI was produced. OPR's draft report acknowledges as much. And it was plain from the three-and-a-half-day friendly cross-examination of Witness #4 that the defense had better access to [redacted] that we did. If the defense had thought that the question of undisclosed interviews was germane to the point about which we were arguing, then it would have raised that question.

If there is any doubt about whether Judge Berger may have been misled by the statement regarding 302s, the rest of the transcript dispels it. After considering the Witness #4 issues over a weekend, Judge Berger convened the parties on a conference call to make rulings.[6] On the *Brady* allegations, she noted that "the defense has been provided with Witness #4 *grand jury testimony* and nothing here necessitates recross."[7] She relied in no way on the reference to 302s. And—more important—she offered the defense the opportunity to further question Witness #4 outside the jury's presence "to determine if there is *Brady* material that has not or was not disclosed."[8] In fact, she made the offer twice, and the second time it was even stronger: "Mr. Taylor, *if you stand on your position* regarding the *Brady* material, I will want to explore that out of the presence of the jury with questions to [redacted] Witness #4 about his statements in terms of telling anyone that [redacted] had not conspired with the defendant outside of *grand jury material* that you already have."[9]

Perhaps not surprisingly, after the Court offered to take testimony to help establish the defense's *Brady* allegations regarding Witness #4 the defense promptly dropped the issue for the rest of the trial. These portions of the transcript, which the draft report conspicuously omits, demonstrate that Judge Berger was in no way misled by the brief reference to 302s, nor was the defense. That the judge demonstrably was not misled is strong evidence that I was not reckless in how I referred to the 302s.

Summary regarding duty of candor. Each of the challenged statements was in fact true, with the exception of an innocent mistake in the statement made at trial. And each of them was made in a context in which the statement was not misleading. A reasonable judge or lawyer reading or hearing the statements would recognize that the absence of an absolute modifier ("every" or "all") indicated that something more limited was intended. There is no indication that Judge Berger was misled by any of the statements. On the contrary, with regard to the trial statement, at least, she clearly was not.

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[6] *Id.* 3720.
[7] *Id.* 3724.
[8] *Id.*
[9] *Id.* 3731 (emphasis added).

Duty of candor: Analysis of context

The draft report's duty of candor findings also fail to consider the case's larger context, in two important respects. *First*, they pluck a handful of words from the millions that were produced, written, and spoken in the course of the case, and put them under the microscope divorced from any consideration of the real-world circumstances of litigation. From the indictment through the end of the trial, the small prosecution team was under relentless time pressure. The defense sought—successfully—to bury us in paper, filing scores of motions that, with exhibits, ran to thousands of pages. Four prosecution attorneys faced off against a much larger defense team, and the workload was staggering. We managed. But for the most part, there was no choice but to write briefs in a hurry. We lacked the luxury of leisurely analyzing every word and phrase. Even if one concludes that these three phrases from that mountain of briefing could have been constructed more carefully, they do not show reckless disregard.

There is a hindsight bias inherent in the draft report's conclusion on duty of candor. The unproduced MOIs have dominated the thinking of OPR's investigators for more than a year now. OPR views them as the most important part of its work on the case and has come to see their nonproduction as a grave problem. The OPR personnel handling the investigation therefore find it incomprehensible that we could file briefs or speak to the Court on the question of MOIs and not see that the unproduced ones were an important issue. From the vantage point of those prosecuting the case, though, it looked very different. Correctly or not, I discerned no problem in the way that the post-indictment MOIs were being handled; we had kept an eye out for any information truly helpful to the defense while juggling the hundreds of other tasks for which we were responsible. From that point of view, our omission to spot the issue and raise it with the Court can be criticized, but it was not reckless.

[redacted]

[redacted]

Duty to disclose

The finding of reckless disregard of the duty to disclose is similarly flawed, for many of the same reasons. It fails to account for both the extraordinary time pressure that the prosecution team faced and for my own [redacted]. It also misses key facts concerning the supposed instances of reckless disregard. Most important, few if any of the statements on which the draft report focuses would genuinely have been helpful to the defense. The clearest evidence of this? When the defense received the supposedly helpful MOIs in early 2017, it did nothing with them at all. That is, a defendant and defense team notable for tenaciously pressing claims based even on thin support found nothing in the memos to justify so much as an attempt to challenge the conviction, despite the fact that the defendant was then in prison. This inaction persisted for well over a year after receiving the MOIs, until the filing last month of a § 2255 motion that was coupled with a campaign ad and press release from the defendant's Senate bid, in which polls revealed him to be falling well behind his opponents. If the statements were helpful, why could the defense make nothing of them until they became a prop at the end of a political campaign?

The truth is that the statements would have been of little help at all. One reason is the specific nature of the charges against the defendant. He was not charged with causing the Upper Big Branch explosion, so statements that went to the explosion's cause rather than to safety law violations did not help his defense. Statements that Massey Energy personnel disagreed with the mine safety laws were similarly unhelpful; disagreement with the law is not a defense.

Another reason that the unproduced statements ultimately proved unhelpful is that they were virtually all cumulative of other evidence that was produced in the case. The draft report, for example, cites witness references to a program that featured the slogan "kill the spider" and involved "report cards" on supposed safety performance at mines. But the prosecution disclosed myriad documents regarding that program, many of which the defense used as exhibits at trial. Those witness statements thus added nothing helpful to the defense. Another example: The draft report cites witness statements suggesting that some number of safety violations would occur at any mine. Besides being a matter of common sense, this was also a matter of public record; a publicly available federal database of mine safety citations demonstrated that every mine in the country commits some number of safety violations (albeit usually far smaller than UBB), and the defense used information from that database at trial. Again, the witness statements added nothing helpful. Similarly, claims about safety

programs that the defendant purportedly implemented were copiously disclosed to the defense in documents, as were claims that he often said that safety violations should be reduced. The defense introduced those documents at trial, as well.

That the supposedly helpful statements ultimately did nothing for the defense is crucial in a couple of ways. It demonstrates that not identifying them as helpful, especially amid the time pressure of trial preparation, was not as egregious a transgression as the draft report suggests. And it shows that the prosecution's process for identifying statements that needed to be disclosed was not so bad after all. The draft report derides that approach as "relying on memory." But if it was truly reckless, then why could defense counsel, when pressed by OPR, not point to a single statement whose nonproduction prejudiced the defense? Did we show poor judgment? Perhaps. But not reckless disregard.

Conclusion

The defendant in this case has made clear that his main aim, besides getting elected to the Senate, is to retaliate against the prosecutors and judges who handled his case. He has spent hundreds of thousands of dollars airing television ads and mailing pamphlets attacking the prosecutors and judges by name (along with a United States senator who he claims masterminded a conspiracy against him). He has spent hundreds of thousands more (maybe millions) in legal fees pressing OPR to generate a report that accuses us of misconduct. And if he gets that report, he will spend another fortune using it to smear us. Like virtually every other prosecutor or former prosecutor, I lack anything approaching the resources needed to combat an ultrarich defendant bent on revenge. I lack, in fact, even the time even to prepare a page-for-page response to the draft report; taking a leave of absence that would allow me to spend as much time on this as OPR has is not an option, to say nothing of the amount of time that the defense has spent engaging OPR.

OPR should not be a vehicle for wealthy defendants to destroy the careers of prosecutors who make mistakes. Unfortunately, using OPR in precisely that way is now part of the playbook for those defendants and their attorneys: Overwhelm the prosecutors with superior numbers before and during trial in hopes of forcing a mistake; then use the same outsize resources to persuade OPR to spend years on a frame-by-frame review of everything the prosecution did until a mistake is discovered; then use the mistake to attack the prosecutors personally. Before we ever presented the indictment, I predicted that that was exactly what the defense would do in this case. And here we are.

All of that is to say that the stakes are high, not just for me but for OPR, which I trust desires a fair outcome here notwithstanding the pressure to which it has been subjected. The draft report overreaches in its findings of reckless disregard. I am not convinced that the statements cited in the duty of candor findings were even mistakes, but they were certainly no worse than errors in judgment. And while I certainly wish, in hindsight, that there had been time to take a different approach to post-indictment interview disclosures, whatever shortcomings arose in that process were errors in judgment, as well.

Surely the sort of reckless disregard portrayed in the draft report would have resulted in at least one unproduced statement that a defense lawyer could claim was prejudicial.

Before you reach a decision on the report, I request the opportunity to meet with you and discuss the matter in more detail. I am aware that the defense has enjoyed many opportunities to exchange information with your office and to lobby for its desired outcome. If you intend to make professional misconduct findings that will wreck my career, I think it only fair to let me first present my case in person. It is unwise, in any event, to deem a person reckless based on a paper record. Far better to talk to them face to face and get a sense of who they are.

I look forward to hearing from you.

Sincerely,

Steven R. Ruby

TAB G

[redacted]

April 19, 2018

The Honorable Robin C. Ashton, Counsel
Office of Professional Responsibility
United States Department of Justice
950 Pennsylvania Avenue, N.W., Suite 3266
Washington, D.C. 20530

Dear Ms. Ashton,

I am in receipt of your office's draft report dated March 22, 2018. I continue to fear that your office has been sucked into a political vortex by a callous, shameless, greedy, arrogant and morally bankrupt individual and his team of hired guns. Indeed, I see a Department of Justice that is on a political precipice that was previously unthinkable—at least to me during my 15 years of proud service to that institution. You must know that this is out of a common playbook for well-healed defendants and their connected lawyers: If you are not successful in beating the charges—and sometimes even if you are—attack the professional prosecutors. Put them on the defensive and make them and other prosecutors think twice about bringing a tough but worthy case designed to hold rich and well-connected defendants accountable.

As I said in my initial letter to you, such a play would not be as concerning if it did not involve the use of the Justice Department itself so deeply and effectively—especially lately. What I am not sure you appreciate is the kind of effect your office has on career prosecutors. Indeed, having been one, I know how concerning it would have been to even be accused of being reckless or lacking candor—even if no violation of law is found. Such is compounded when defendants with nearly limitless resources are able to take, twist and trumpet such allegations—as here—in a political campaign. Because of these matters, and if you are not persuaded to revise you report, I hope you will very carefully consider whether you publicly release a report with such loaded terms and phrases such as "reckless" and "violating a duty of candor"—especially considering that Blankenship has already made a very public, political and calculated issue of your investigation and its "potential" findings so close to a primary election for U.S. Senate in which appallingly he is a candidate.

Of course, I agree with your conclusion that "discoverable material" was not intentionally withheld. I also agree that no one violated the tenets of *Brady v.*

[redacted]

Maryland, *Giglio v. United States* or the West Virginia Rules of Professional Conduct.

However, I most certainly disagree that anyone on the prosecution team engaged in any sort of "reckless" behavior or violated any duty of candor. Indeed, given the report's findings that there were no violations of *Brady*, *Giglio* or the Rules of Professional Responsibility it seems rather inconsistent for the report to conclude that there was any recklessness or any lack of candor.

As I told you before, I did not and do not have access to the case file. Even if I did, it would likely take months to get to the point where I could meet your allegations point by point.

However, first let me say, it certainly is true that I placed a great deal of faith and confidence in Steve Ruby. I continue to believe that faith and confidence was well placed. Anyone who knows and has worked with him would agree that it is not a mistake—much less reckless—to do so. Steve is a brilliant attorney. This was an extraordinary investigation and series of prosecutions and Steve led the charge deliberately and admirably. He had an amazing command of the facts and the law bearing on the investigation.

Anyone who truly understands the investigation and the resulting prosecution of Blankenship knows that Blankenship used so-called safety initiatives and other professions of safe working conditions as a cudgel to beat back credible allegations of abhorrent conditions in the mines he oversaw—including Upper Big Branch. The constant talk of safety was designed to give the illusion that Blankenship cared about safety. Accordingly, it is certainly unsurprising that there is a lot of such talk in the material at issue in your report. Our case proved that he did not truly care about anything but profits, and it did so primarily with the testimony of individuals like the miners who saw the shocking conditions first-hand day in and day out. Because of Blankenship's massive propaganda machine, again it is unsurprising that his most devoted acolytes would say and say again that he cared about safety.

Despite the team's intent that all investigative materials generated by the expansive investigation be provided in the discovery process after the indictment was returned, the failure to turn over but 10 out of more than 300 Memoranda of Interview for interviews conducted pre-trial seems to be simply an oversight apparently resulting from the fact that the MOIs were generated after discovery had gone out. I would differ strongly with your conclusion that such an oversight was in any way "reckless".

[redacted]

As to the other material, while I apparently do not recall matters in the exact way Steve does, I would note that there is a very real difference between Memoranda of Interview for interviews conducted pre-indictment, and Memoranda of Interview prepared as a part of trial preparations post indictment.

After the indictment was returned in this case, I recall that the Court set the matter for trial within I believe 70 days. The trial team started almost immediately preparing for trial, which of course involved meeting with witnesses. Even though the trial was continued twice more, I seem to recall that the trial team was in almost a constant state of trial preparation.

While I have not had the opportunity to review them, the Memoranda of Interview that were apparently not released to the defense were most certainly generated as a result of preparations for trial. As such, these Post-Indictment MOIs are likely more accurately described as memoranda of trial preparation sessions. To disclose trial preparation memoranda wholesale would have disclosed key elements of our trial strategy. It would be entirely reasonable—and certainly not reckless—to decide not to turn over such memoranda. That being said, I do recognize a continuing obligation to turn over new exculpatory information, but I certainly do not recall any scenario or discussions where the team felt there was any such information where such information was not or had not been produced. I also cannot understand how it could be determined to be "reckless" not to have a system for review when most assuredly team members were in the trial preparation sessions. How was any "review" necessary when it was being experienced in real time?

As you recognize, the government is not obligated to turn over the entirety of any MOIs. While it is true, we generally did so—and did so here—this was a rather unique case. Even if the Post-Indictment MOIs contained "discoverable" information, I am entirely confident that the information was redundant of information disclosed in our expansive discovery or was otherwise available--likely more available—to the defense. It is certainly telling that the defense specifically declined your invitation to state with particularity how the defense was prejudiced. Their goals were simply to try to punish the prosecution team for having the temerity to prosecute and convict someone they viewed should be untouchable. As an aside, I do not recall any reciprocal discovery being provided. However, it is evident from the vigorous and exhaustive defense Blankenship's team put on that the defense was likely privy to as much—if not more—information about the allegations than the investigative and prosecution team was.

[redacted]

It is also telling that the defense has gone to the Court, here on the eve of a primary election. Given the Court's involvement now, I cannot imagine why your office would wade into these turbulent, politically charged waters.

Two more items of note: Any perception that I did or did not do something because of the personal attacks made on me and my family by the defense is absolutely false. Also, if one has spent any time dealing with or speaking to members of Blankenship's defense team, I cannot imagine one would not make the prudent decision to only deal with them through written communication—and even then—only when absolutely necessary.

I believed at the time the prosecution team had complied with all of our discovery obligations and your report has not persuaded me otherwise. There was no "recklessness"; there was no violation of the duty of candor to the Court by anyone on the prosecution team.

After apparently being hounded by Blankenship's hired guns and spending probably significant parts of two years looking at these matters, I appreciate that your office might feel pressure to do "something" with that work. However, I hope your office will recognize that this was a difficult case. It resulted from a long investigation into the deadliest mine disaster in a generation. The case against Blankenship for conspiring to willfully violate mine safety laws was a strong one built brick by brick. Blankenship had a defense that I am sure cost Alpha Natural Resources tens of millions of dollars, and he walked away with tens of millions of dollars in his pocket after putting miners at risk every day he was in charge. Both the Court and the prosecution team bent over backward to see that Blankenship received a fair trial, he did in fact receive a fair trial, and he was convicted. It was a hard-fought and impressive victory for making mines—indeed all workplaces—safer. A report from your office with loaded terms and phrases—even while finding no violations of *Brady, Giglio* or the Rules of Professional Conduct—would unfairly call into question that work and erode the very real good that resulted. The only benefits would accrue to a scoundrel now running for the United States Senate to further erode protections for workers.

Sincerely,

R. Booth Goodwin II

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Pre-Indictment MOIs Not Disclosed

	Last Name	First Name	Interview Date	MOI Date	MOI #	Date MOI received by the USAO	Testified At Trial
1	Witness #14		9/18/2014	11/17/2014	MOI-001362-001366	1/23/2015	No
2	Witness #14		1/25/2012	1/25/2012	MOI-001389-001390	2/4/2015[1]	No
3	Witness #8		2/5/2014	2/7/2014	MOI-001391-001395	2/12/2015	No
4	Witness #4		10/22/2014	10/23/2014	MOI-001396-001404	2/12/2015	Yes
5	Witness #6		8/14/2014	8/18/2014	MOI-001417-001419	2/12/2015	No
6	Witness #12		6/4/2014	6/6/2014	MOI-001427-001430	2/12/2015	No
7	Witness #15		11/27/2012	11/28/2012	MOI-001431-001435	3/23/2015	No
8	Witness #15		3/11/2014	3/12/2014	MOI-001436-001439	3/23/2015	No
9	Witness #1		11/10/2011	11/14/2011	MOI-001505-001507	6/19/2015	No
10	Witness #16		11/10/2011	11/14/2011	MOI-001508-001510	6/19/2015	No
11	Witness #17		3/11/2014	3/14/2014	MOI-001511-001514	6/19/2015	No

[1] Found in USAO files; not clear when USAO received.

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Post-Indictment MOIs Not Disclosed

	Last Name	First Name	Interview Date	MOI Date	MOI #	Testified At Trial
1	Witness #48		11/21/2014	11/21/2014	MOI-001346-001348	No
2	Witness #49		1/16/2015	1/21/2015	MOI-001367-001368	No
3	Witness #66		1/20/2015	1/21/2015	MOI-001369-001372	Yes
4	Witness #50		1/15/2015	1/27/2015	MOI-001373-001376	Yes
5	Witness #51		1/28/2015	2/2/2015	MOI-001377-001379	Yes
6	Witness #52		1/27/2015	2/2/2015	MOI-001380-001381	No
7	Witness #53		1/28/2015	2/2/2015	MOI-001382-001384	Yes
8	Witness #40		1/27/2015	2/2/2015	MOI-001385-001388	Yes
9	WItness #54		11/21/2014	2/2/2015	MOI-001405-001407	No
10	Witness #14		1/16/2015	1/20/2015	MOI-001408-001409	No
11	Witness #3		2/4/2015	2/6/2015	MOI-001410-001415	No
12	Witness #5		1/21/2015	1/26/2015	MOI-001416	No
13	Witness #66		1/30/2015	2/6/2015	MOI-001420-001426	No
14	Witness #19		3/17/2015	3/30/2015	MOI-001440-001441	Yes
15	Witness #41		3/19/2015	3/30/2015	MOI-001442-1444	Yes

	Last Name	First Name	Interview Date	MOI Date	MOI #	Testified At Trial
16	Witness #55		3/17/2015	3/30/2015	MOI-001445-001448	Yes
17	Witness #27		3/31/2015	3/31/2015	MOI-001449-001450	Yes
18	Witness #15		3/25/2015	3/31/2015	MOI-001451-001453	No
19	Witness #4		4/2/2015	4/8/2015	MOI-001454-001457	Yes
20	Witness #56		4/3/2015	4/7/2015	MOI-001458-001459	Yes
21	Witness #42		4/1/2015	4/13/2015	MOI-001460-001461	Yes
22	Witness #19		4/9/2015	4/13/2015	MOI-001462-001463	Yes
23	Witness #57		4/1/2015	4/13/2015	MOI-001464-001465	No
24	Witness #66		4/8/2015	4/13/2015	MOI-001466-001467	Yes
25	Witness #58		4/29/2015	4/30/2015	MOI-001473	No
26	Witness #13		5/4/2015	5/5/2015	MOI-001474-001478	Yes
27	Witness #59		4/23/2015	4/30/2015	MOI-001479-1480	Yes
28	Witness #20		5/14/2015	5/21/2015	MOI-001481-001484	No
29	Witness #13		5/12/2015	5/26/2015	MOI-001485-001490	Yes
30	Witness #13		5/29/2015	6/19/2015	MOI-001491-001504	Yes
31	Witness #45		3/26/2015	3/31/2015	MOI-001515	No

	Last Name	First Name	Interview Date	MOI Date	MOI #	Testified At Trial
32	Witness #44		6/24/2015	6/25/2015	MOI-001516-001517	No
33	Witness #7		6/3/2015	7/9/2015	MOI-001518-001527	No
34	Witness #43		7/31/2015	8/5/2015	MOI-001528-001529	Yes
35	Witness #13		7/27/2015	8/5/2015	MOI-001530-001533	Yes
36	Witness #60		9/9/2015	9/10/2015	MOI-001541-001545	No
37	Witness #4		9/12/2015	9/23/2015	MOI-001546-001549	Yes
38	Witness #4		9/21/2015	9/23/2015	MOI-001550-1551	Yes
39	Witness #42		9/17/2015	9/23/2015	MOI-001552	Yes
40	Witness #13		8/28/2015	9/11/2015	MOI-001553-1554	Yes
41	Witness #41		9/13/2015	9/23/2015	MOI-001555	Yes
42	Witness #27		9/29/2015	9/29/2015	MOI-001556-001560	Yes
43	Witness #61		9/24/2015	10/5/2015	MOI-001563-001567	No
44	Witness #11		9/24/2015	10/5/2015	MOI-001568-001569	No
45	Witness #31		9/30/2015	10/5/2015	MOI-001570	No
46	Witness #62		9/28/2015	10/5/2015	MOI-001571-001573	Yes
47	Witness #33 Witness #63 Witness #64		9/24/2015	10/5/2015	MOI-001574	No
48	Witness #55		9/29/2015	10/5/2015	MOI-001575	Yes
49	Witness #65		10/13/2015	10/15/2015	MOI-001576-001578	Yes

	Last Name	First Name	Interview Date	MOI Date	MOI #	Testified At Trial
50	Witness #4		10/18/2015	10/20/2015	MOI-001579-001582	Yes